SEMI-CENTENNIAL MEETING WILL BE HELD AT SEATTLE JULY 25, 26, 27

AMERICAN BAR ASSOCIATION JOVRNAL

MARCH, 1928

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Arrangements for Seattle Meeting

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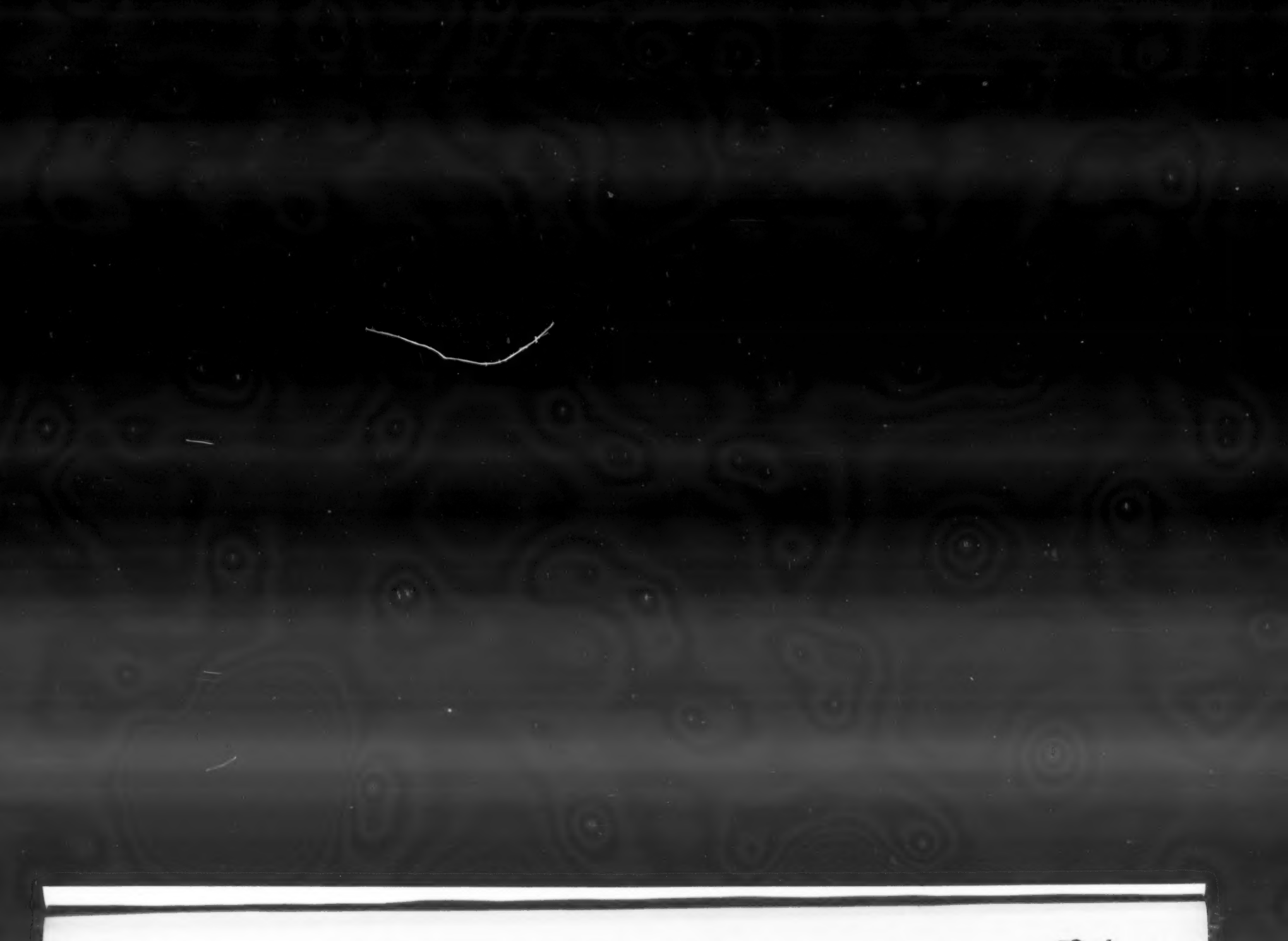

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AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. XIV MARCH, 1928 No. 3

Putting Law on the Air

THE Association of the Bar of the City of New York has arranged with the National Broadcasting Company for the delivery of a series of fifteen radio talks by prominent lawyers on "Fundamentals of the Law." The talks are to be given on Tuesday evenings from Station WJZ and are to be in language readily intelligible to the public. The speakers will include such national figures as Charles E. Hughes, John W. Davis, George W. Wickersham, James M. Beck, Henry W. Taft, William D. Guthrie, Louis Marshall, Paul D. Cravath, Judge Frederick E. Crane and U. S. District Attorney Charles H. Tuttle. The first address was given on Tuesday evening, March 6 by Hon. Louis Marshall, of New York, on the subject, "What is the Constitution?" The dates and subjects for the remaining addresses of the series are as follows: March 13—Law, Liberty and License, by the Honorable Charles H. Tuttle, U. S. Attorney for the Southern District of New York; March 20th—The Living Law, by Judge Frederick E. Crane, of the New York Court of Appeals; March 27—Birth of the Constitution, by the Honorable James M. Beck, former Solicitor General of the United States; April 3—The Great Charter; April 10—Habeas Corpus; April 17—Three Departments of Government; April 24—Nation and States; May 1—Supreme Law of the Land; May 8—Federal Bill of Rights; May 15—Search and Seizure; May 22—Fourteenth Amendment; May 29—Due Process of Law; June 5—Freedom of Speech; June 12—International Law. The names of the speakers who will deliver the eleven last-named talks will be announced later.

Bankruptcy Referees' Code of Ethics

THE Code of Ethics adopted by the National Association of Referees in Bankruptcy at the meeting held at Buffalo, Aug. 29 and 30, 1927, has been published in the official organ of that body and contains matter of general interest. The Preamble states that while the Association fully subscribes to and accepts in every particular, so far as applicable, the Canons of Ethics adopted by the American Bar Association, yet it recognizes that there are distinctive features in bankruptcy law, procedure and administration which require particular consideration and treatment. Article V, which has as its title "Maintenance of Right Relationships," is the most important. It contains among other things a declaration against so-called bankruptcy rings. The entire article is as follows:

"If right relations are to be maintained in the several connections herein specified,—

"(a) *With the Judge*—He shall promptly hear, determine and report upon matters referred to him by the Judge.

"(b) *With the Department of Justice*—He shall willingly and cheerfully give every assistance to the Department of Justice in making its examinations of his offices as provided by law, and shall give to the Department from time to time such information as it may require.

"(c) *With the other Officers and the Employes of the Court*—(1) He shall cooperate courteously and effectively with the other officers of the Court in expediting the work of his office.

"(2) He shall in the appointment of receivers, and in authorizing the employment of auctioneers, investigators, auditors and others, be governed by no other consideration than the speedy and economical administration of estates and shall exact of them efficient service and complete and prompt reports.

"(3) In the employment of clerical assistants he shall exercise the same care, show the same consideration, require

the same service and pay the same compensation, as he would as a fair, considerate and just employer in any other capacity.

"(d) *With Attorneys*—(1) He shall not authorize the employment of counsel unless actually necessary.

"(2) He shall not tolerate divided or 'split' fees, so-called, between attorneys, (except between attorneys appearing jointly of record), between attorneys and officers and employes of the Court, or between such officers and employes or either of them.

"(3) He shall discourage the solicitation of claims for the purpose of attempting improperly to control the administration of estates.

"(4) He shall do everything in his power to break up any combinations, which have for their object the improper control of the administration of bankrupt estates.

"(e) *With Creditors*—(1) He shall administer estates with absolute impartiality as between claimants in accordance with their legal rights as they may be made to appear, and pursuant to his oath of office, 'do equal right to the poor and to the rich,' constantly having in mind that each estate is before him for rightful disposition and that it is of no concern to him, whether it goes to secured, priority, or general creditors, to reclamation petitioners or to others, as long as it is distributed in accordance with rights prescribed by law.

"(2) He shall always remember that the property he is administering is, generally speaking, the property of the creditors; that he is in a sense their steward and bound to handle it for them as expeditiously and economically as possible; and that this means that he shall not receive himself nor permit anyone else to receive from any estate under administration anything more than is honestly, fairly and legally deserved.

"(f) *With Bankrupts*—He shall, at all times, bear in mind that the Bankruptcy Act was enacted as much for the relief of worthy bankrupts as for the benefit of creditors, and shall show due consideration to those who shall appear worthy; but as to the obviously unworthy—the fraudulent, the liars and the cheats—he shall spare no effort to expose them and to bring them to justice.

"(g) *With his fellow Referees*—He shall co-operate fully with his fellow Referees in securing the best possible administration of the Bankruptcy Act.

"(h) *With the Public generally*—He shall abstain at all times from relations, however honorable, which, because of their appearance, give to the public an unfavorable impression of the Bankruptcy Court, and shall do all he can, through proper contacts with the public, to remove any prejudice which may exist against the Act or the Court, ever bearing in mind that his office is a high public trust with service as its chief attribute."

Prelegal Education

IN the December 1, 1927, issue of "The Lawyer and Student" appears an editorial entitled "Prelegal Education", the opening sentence of which states: "The American Bar Association recently has reversed its position as to prelegal educational requirements of applicants for admission to the bar." This statement was founded on misinformation as to the action taken by the American Bar Association at its last meeting.

When attention was called to this misstatement, the editor of "The Lawyer and Student" replied as follows:

"We were supplied with a multigraphed or mimeographed interpretation of the Section's recent action, which interpretation ran along the lines followed by me in the editorial you criticize. We now have reason to believe that this material was sent from an interested source, though I had no such reason at the time of writing and thought it came from the American Bar Association itself."

It is needless to say that the statement referred to did not come from the American Bar Association or anyone officially representing it. The resolution in

question which was passed at the Buffalo meeting was as follows:

"Be it further resolved that the several states be urged, through the Council of Legal Education and Admissions to the Bar, to provide at stated times and places for pre-legal examinations to be held by the university of the state or by the board of law examiners thereof, for those applicants for admission to the bar obliged to make up their preliminary qualifications outside of accredited institutions of learning."

Instead of being a reversal of the position previously taken as to college work, it was in fact merely a restatement of the position previously taken by the Conference of Bar Association Delegates at their meeting in February, 1922, at which they formally approved the American Bar Association standards and recommended them for adoption by the various states.

In presenting the resolutions approving the American Bar Association standards at this conference, several added resolutions were offered among which were the following:

"3. Further, we believe that law schools should not be operated as commercial enterprises, and that the compensation of any officer or member of its teaching staff should not depend on the number of students or on the fees received.

"5. Since the legal profession has to do with the administration of the law, and since public officials are chosen from its ranks more frequently than from the ranks of any other profession or business, it is essential that the legal profession should not become the monopoly of any economic class.

"6. We endorse the American Bar Association's standards for admission to the bar because we are convinced that no such monopoly will result from adopting them. In almost every part of the country a young man of small means can, by energy and perseverance, obtain the college and law-school education which the standards require. And *we understand that in applying the rule requiring two years of study in a college, educational experience other than that acquired in an American college may, in proper cases, be accepted as satisfying the requirement of the rule, if equivalent to two years of college work.*"

The Chairman of the Conference of Bar Association Delegates in introducing the resolutions said:

"I only wish to say that I think you will find within these resolutions an answer to many of the arguments offered here, offered with the thought that they were opposing the program as a whole. It is only to meet those suggestions that this resolution is put in the form that has been adopted."

The understanding as to two years of college work which was expressed in these resolutions has been recognized by the American Bar Association since their adoption. Nor has there been any attempt to make any different interpretation of the rule since that time. The resolution passed at Buffalo last September has strengthened rather than weakened the present rule by providing a definite method of testing the work offered as equivalent to work actually done in a college.

H. C. HORACK.

WHERE THE JOURNAL IS ON SALE

The American Bar Association Journal is on sale at the following places:

New York, Brentano's, 1 W. 47th St.

Chicago, Brentano's, 218 So. Wabash Ave.; Post Office News Co., 31 West Monroe St.

Denver, Colo.—Herrick Book & Stationery Co., 934 Fifteenth St.

Detroit, Mich.—John V. Sheehan & Co., 1550 Woodward Ave.

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A NEW PROFESSIONAL PSYCHOLOGY ESSENTIAL FOR LAW REFORM

Traditional Hesitancy to Change Should Not Deter Lawyers from Drastic Revision of Some of the Bases of Professional Life—Cases in Which Jury System Is Ineffective—Popular Misconception of Subject—New Attitude Toward Law of Evidence Suggested—Judges' Power to Function Properly Should Be Restored—Waste of Time and Money in Futile Appeals—The "Will to Reform"*

By Hon. Joseph M. Proskauer

Justice of Appellate Division of Supreme Court of New York, First Department

WORKABLE law reform will not be accomplished merely by specific change in statute and rule. It must rest largely on a fundamental change in the group psychology of the legal profession toward its function and of the lay psychological attitude toward the administration of justice.

By way of preface let me say that I disclaim any intent to attack bench or bar. A great difficulty in the effectuation of law reform has always been a tendency of organs of public opinion to describe every constructive effort of a member of the profession as an attack upon his fellows. Constructive self-criticism should not be so interpreted. The conservatism of lawyers is at once their strength and their weakness. They must to an extent be conservative. It is their function to maintain and preserve the rules of conduct by which men must live and deal with one another, acquire property, contract, and enjoy personal freedom and liberty. The rules of life cannot be arbitrarily changed from day to day. Men have acted in reliance upon them. They look to the law to safeguard them in this just reliance. Nor has our conservatism kept us from tremendous achievement in the adaptation of the substantive rules of the common law to the myriad novel activities of modern life and from success for the most part in preserving the balance of right and obligation between man and man in the new complexity of our contemporary civilization.

We must, none the less, realize that our natural conservatism is today unduly retarding the accomplishment of essential reforms. We lay no claim to perfection; but we should see to it that our traditional hesitancy to change shall not deter us at this juncture from drastic revision of some of the bases of our professional life. Formulating the warning from our past, Dean Pound[1] has pointed out that "the author of the Mirror of Justices set it down as an abuse that Englishmen were no longer permitted to try issues of fact by battle"; that "when we claim credit for the development of commercial law at the end of the eighteenth and in the nineteenth century, and admire the effective strokes of Mansfield to make straight the paths of justice in commercial affairs, we must not overlook that one of the most liberal of American lawyers resisted adoption of the common law for his state, as of the time of the Revolution, because of objection to what he called 'Mansfield's innovations'."

We must not let this tendency make us deaf to the lay appeal for readjustment of legal machinery. In November of last year a great metropolitan newspaper[2] stated editorially: "Steadily the current of lay opinion swings to the belief that if tangible reforms are to take place in American criminal jurisprudence laymen and not lawyers in legislative office will have to be depended upon." Another great newspaper[3], extending the subject matter of its discussion to the non-criminal law as well, asks: "Will the bar choose rather to be driven in a direction where it ought to lead?"

In the middle of the nineteenth century the British bar was confronted with similar problems. We may look to the course of English law reform for helpful guidance. While English justice today is far from perfect, it cannot be gainsaid that their system excels our in flexibility and in the practical adaptation of the machinery of justice to a speedy and effective judicial determination. The impetus to law reform in England came from the philosophic writing of Bentham. By 1825 the lines of cleavage between laymen and lawyers had become definitely marked. The struggle for reform became a contest between them. The Westminster Review[4] stated that "so successful have been the artifices of lawyers, that Englishmen have hitherto almost universally believed . . . the assertion of Sir William Blackstone, that these inconveniences (the delay, vexation, and expense of English judicature) are the prices we necessarily pay for the benefits of legal protection." Later it attributed the technicalities of pleading to the selfishness of the profession, saying[5]: "Not a formality is there which serves not as a pretext for charges; and scarcely a moment of delay which is not contrived to minister either to the ease or the profit of lawyers, if not to both." The Edinburgh Review[6] warned that "Old men may indeed . . . for a season stay the plague of improvement. But their night is far spent. The day is coming when there must be a vigorous and

*Address before the Association of the Bar of the City of New York on Feb. 2, 1928.

1. The Problems of the Law, 12 Amer. Bar Assn. Journal (1926) p. 81.

2. New York Sun, November 16, 1927.
3. The Evening World, October 3, 1927.
4. Westminster Review, Vol. 4, pp. 60-88, July, 1825.
5. Westminster Review, Vol. 6, p. 40, July, 1826.
6. Edinburgh Review, Vol. 45, p. 481, March, 1827.

unsparing revision . . . of the whole administration of justice in this country."

The force of these storm clouds of reform born in the philosophy of Bentham were at first but dimly seen by the profession. Their blindness points a portentous warning to the profession of today. The Jurist[7] retorted that it was an incalculable benefit "that in the length of time which must elapse before a cause can be decided in that court, passions have time to cool, the angry feeling that prompts to litigation may subside, and if there are some obstinate spirits who are disposed to fight to the last, their ability to carry on the warfare is put at an end by the ruinous expense of the long-protracted contest."

The initial timid proposal of Lord Brougham, representing the more enlightened elements at the bar, was the conventional panacea for every judicial emergency—an increase in the number of judges. This solution lawyers could "contemplate with equanimity, for it required no change whatever in familiar practices and offered the additional attraction of more judicial appointments. But the British public," continues Professor Sunderland,[8] "with its strong business sense, refused to believe that the true remedy for defective machinery was the employment of more engineers to keep it going."

By the end of 1850 the battle lines were definitely formed. The London Times[9] sounded this slogan: "If the minds of legal men are to be forever perversely directed to the past, if they will not divest themselves of old prejudices and accept new views and ideas suited to the exigencies of the present times, the public must be content with the attempts made by laymen to improve a system which cannot longer be permitted to remain in its old and mischievous condition." "Let the bar look to it in time."[10] And again, a few months later[10] it warned that "There would seem to be something in the profession of the law which blinds its votaries to the defects of any system which they are called upon to administer. . . . The example of their fathers, the tone of the treatises from which their knowledge is derived, the authority of the judges, the very atmosphere in which they practice—all are calculated to withdraw the minds of lawyers from any endeavors to reform the law."

The Westminster Review[11] joined the chorus, proclaiming that "The mental accumulations which are the skill of the judge and the lawyer in their art, are heaps of prejudices, things prejudged, and stumbling blocks, when they begin to investigate procedure as a science. . . . We want, therefore, men of business, men of the world, and men accustomed to broad scientific researches associated with lawyers in this work."

The bar of England did not sufficiently heed the warnings, and when Parliament began to enact law reforms, the control quickly escaped from the profession. From 1842 onward we can trace a steady decrease in the number of lawyers on parliamentary committees on law reform. The last royal commission on legal procedure, appointed in 1913 to investigate the causes of the law's delays, was made up of one judge, one barrister, one bachelor of laws and eight laymen.

The English reform of judicial procedure was accomplished in spite of the opposition of the profession. For us I repeat the warning of the London Times of 1851: "Let the bar look to it in time." For I believe profoundly that the task is both our duty and our privilege. We ourselves are best fitted to do our own house-cleaning. In England, under lay, not professional, regulation, a change, certainly as sweeping as the introduction of the common law action on the case, was made in the administration of justice.

The Judicature Act made procedure speedier, less technical, more efficient and more flexible.

Most important of all, a mandate was laid on the profession to keep it so in actual administration.

No change in rule or statute is worth making unless it takes its roots in a professional will to effectuate and preserve the new order.

In this State in 1852 we adopted the Field Code of Procedure. This sweeping reform became in practice largely a futile gesture, because legal opinion was opposed to the change and public opinion not sufficiently aroused to enforce the reform. The hopes of its sponsors proved evanescent and vain. It was otherwise with the English Judicature Act. The profession as a whole supported its innovations, which it had theretofore opposed, and the judges refused to fall back into the slough of technical procedure. In *Davey* v. *Garrett*,[12] when counsel sought to use pleading under the Act after the manner of the old procedure in Chancery, James, *L. J.*, said: "We must not be driven to confess as Oliver Cromwell did with a sigh, in reference to his ineffectual attempt to reform the law and procedure of this country, that the sons of Zeruiah are too hard for us. For my own part, I do not mean to succumb to their devices." Not only did the English judges refuse to encroach upon the completeness of these reforms, but the British public opinion has continued successfully to demand new reforms.

I propose that the profession in this country shall remove itself from classification among "the sons of Zeruiah." The task is no less stupendous than the one which confronted our English brethren. We should lead and not be driven. It is primarily our duty to see that our machinery of justice has the capacity to care for the needs of our modern life. It will not help to say that the delay of justice is due, not to the law, but to the overwhelming activities of contemporary life. We must ourselves supply the tools to do our work. It will not suffice to fall back upon the panacea of more judges. In a nation which prides itself upon its genius for practical achievement we must not only accomplish the result, but we must accomplish it without unnecessary friction, delay and expense. Civil practice acts and simplified rules of practice are at best but steps in the right direction; and are even steps only if all of us, lawyer and judge alike, avow and discharge our obligation to the profession and to the community to practice and administer the law, no longer in any spirit of contest or chicanery, but in the spirit of one who is upon a quest for justice. Nothing short of an aroused professional opinion, markedly different from our class

7. The Jurist, Vol. 2, p. 73, 1838.
8. The English Struggle for Procedural Reform, 39 Harvard Law Review, pp. 724, 736.
9. London Times, December 24, 1850; July 29, 1851.
10. London Times, July 19, 1851.
11. Westminster Review, Vol. 38, pp. 107-120; January, 1843.
12. 38 L. T. N. S. 81 (1878).

consciousness of today, and backed by a popular support, for which we must educate and persuade the public, will achieve our goal.

I should like to apply these generalities to some specific phases of our problem. I maintain that the system of jury trial in civil contract cases has been transformed from a useful process into a wasteful, ineffective and outworn fetish. I do not refer to jury trial in a criminal cause, nor even to jury trial in the type of civil cause like the negligence case, where a public demand for the judgment of the average man may still have logical basis. But in this country of today our people have come to regard jury trial in all types of cases with a baseless reverence and awe that finds its parallel in the jurisprudence neither of any other civilized country in this world nor in the historic origin of trial by jury. On this phase we need a revision of lay as well as professional attitude. We are entitled to ask it for three reasons.

The first reason is that the method is wasteful of time and inefficient in result when applied to the typical contract case. In a recent address, Dr. Pierre Le Paulle, of the French bar,[12] stated: "The three main criticisms that the civil lawyer makes on the jury system in civil cases are: I.—It is not an efficient means of discovering the truth; II—It hinders the application of business-like methods in the court-room; and III.—It increases delays and expenses. We believe that induction and discovery of truth is both a science and an art. . . . We say to the public: 'Get out of the court-room; it is not enough to be well-intentioned to discover the truth, it requires a whole technique and a knowledge that you do not have.'"

Almost every active trial lawyer or judge will concur in this opinion. We observe daily the spectacle of twelve perfectly honest jurors, untrained in the analysis of evidence, ignorant of the subject matter of the litigation, inexpert in that art peculiar to the lawyer by which he quickly absorbs and assimilates as his own that which is primarily the business of others; we see these twelve men sitting through a long complicated trial, with scores of documents and letters and accounts in the evidence, vainly endeavoring to interpret that which they can barely understand. We know the waste of time consumed in reading to a jury hour after hour and day after day written evidence which can be handed up to a trial judge and absorbed by him in a few minutes; and we know the frittering away of time in openings and summations. This is a spectacle which must strike dismay into the heart of every lover of justice. There is no more practical reason today for persistence in jury trial in this type of case than there would be for the continuance of trial by battle.

I can testify to my own experience sitting as a trial judge in the non-jury part provided in this country for the trial of actions at law. It was there possible fairly to dispose of three times as many contract cases in a given time without a jury as with one and with infinitely greater satisfaction to every party concerned. This part depends for its business upon consent of counsel, and notwithstanding the results achieved, it is with the greatest difficulty that we have been able to maintain the part; lawyers and litigants alike seem to prefer the pother and fuss of the cumbersome method of trial by jury, and yet are unable to formulate a tangible basis for their preference.

The second reason is that we may fairly assure the public and the profession that the instinctive distrust of magistrates, which I think is a basis for this reluctance to waive jury trial, is no longer warranted. That distrust was born of the suspicion of English magistrates which the founders of our nation had at the time of the Revolutionary War. It showed itself in the refusal to give adequate powers to executive officers in the Articles of Confederation. It persisted in the elaborate system of checks and balances contained in the Constitution itself, and it manifests itself constantly in many forms of our public life today. It is the survival of an organism which has ceased to be useful, a kind of political vermiform appendix. Tyrants are not our most threatening danger today, and certainly, with a formulated body of substantive law and copious right of appeal, we fairly give assurance that the widespread growth of the custom of waiver of jury trial in civil causes need not be distrusted. It has come about in England almost as a matter of course. The trial before a jury of a complicated contract cause is there practically unknown; it simply is not done.

The third reason is that the popular sanctification of a jury trial in civil causes is based upon a complete popular misconception of its historic origin. There seems to be latent in public opinion a feeling that adherence to jury trial in all types of cases is something historically as sacred and as much to be preserved as the rights accorded by Magna Charta and the Bill of Rights. Originally, jurors were always of the vicinage. A certain number (at least six as late as 1543) were required to come from the particular hundred in question, in order to inform the others. In an important case in 1374, Belknap, *C. J.*, said: "In an assize in a county, if the court does not see six, or at least five, men of the hundred where the tenements are, to inform the others who are further away, I say that the assize will not be taken. A multo fortiori, those of our county cannot try a thing which is in another county." You will note that the jury was called into the box because it contained men, at least five or six, who knew about the litigants and the subject matter of the litigation, a notion as far removed as the poles from our present-day conception of a jury of twelve disinterested citizens acquainted neither with the parties nor with the subject matter of the litigation. Thayer in his "Preliminary Treatise on Evidence" delightfully illustrates this point by his quotation from Palgrave's book on fourteenth century life, "The Merchant and the Friar." Bacon, an English friar, is showing London to Marco Polo. They attend the beginning of a trial at Guild Hall, in 1303, of an alleged robber of the king's treasury. "'Sheriff, is your inquest in court?' said the mayor. 'Yes, my Lord,' replied the sheriff; 'and I am happy to say it will be an excellent jury for the crown. I myself have picked and chosen every man on the panel. . . . . There is not a man whom I have not examined carefully. . . . All the jurors are acquainted with (the prisoner). . . . I should ill have discharged my duty if I had allowed my bailiff to summon the jury at haphazard. . . . The least informed of them have taken great pains to go up and down in every hole and corner of Westminster

12. New York Law Journal, Aug. 29, 1927.

—they and their wives—and to learn all they could hear concerning his past and present life and conversation. Never had any culprit a better chance of having a fair trial.'"[14] Not only were jurors supposed to be acquainted with the parties as their neighbors, but there existed the power of selecting those who were specially qualified for a given service. Thayer records that in 1280, Florentine merchants living in London were placed upon the jury where there was an issue as to an act done in Florence. Experts from particular trades were called, like jurors of cooks and fishmongers, where there was an accusation of selling bad food. And in 1645, in the Kings Bench, "The court was moved that a jury of merchants might be retained to try an issue between two merchants, touching merchants' affairs, and it was granted, because it was conceived they might have better knowledge of the matters in difference which were to be tried than others could who were not of that profession."[15]

I think it must be evident that we have not maintained a system whereby men familiar with the litigants and the litigation in comparatively small communities, where the modes of life were simple, were called upon to act as triers of the facts. We have kept the shell alone. We now call twelve men into the jury-box, not because they know the litigants or the controversy, but because they do not know them. The questions they are to decide are no longer the simple issues of the earlier centuries. The sentimental devotion to the notion of jury trial in contract causes is an outworn creed. I propose that we teach this to our lay public and with their co-operation secure a widespread growth of the custom of trial before judge without jury by consent as a simple, effective, economical and direct method for the determination of controversies.

I next ask you to consider whether the time has not come for a radical and sweeping change in our whole attitude toward the law of evidence. It was during the last half of the eighteenth century that the jury came to rely solely upon the evidence adduced before it and not in part upon private sources of information. There then came the first manifestation of our law of evidence, which has rapidly developed from an orderly method of procedure, designed to assist the jury, into a complicated set of rules too often designed to befog both judge and jury.

Most of the time in our courts of law is not consumed with the adducing of evidence; it is largely occupied with controversy and discussion as to the manner in which the evidence shall be adduced.

And here again I venture the assertion that in this practical country, immeasurably more than in any other civilized country in the world, there are consumed in the courts vast quantities of priceless time with wholly unpractical contention regarding forms of questions, the attempt to draw a sharp dividing line between fact and opinion, the unending chatter as to whether the question calls for a conclusion, the meaningless formulation of and assault upon interminable hypothetical questions.

The law of evidence is not an end in itself and we should cease making it our objective. It is purely adjective law, simply a method by which to ascertain facts.

A great accomplishment of the English procedural reform was to emphasize that rules of evidence are merely a method and not an end of litigation. Though originally an erroneous ruling on evidence was not a ground for a new trial, the Court of Exchequer in 1835 "announced a rule which in spirit and in later interpretation signified that an error of ruling created *per se* . . . a right to a new trial."[16] England cut this Gordian knot by repealing this rule under the Judicature Act of 1883, Rules of the Supreme Court, Order 39, rule 6. In England today a new trial would be granted only if the error complained of should in fairness have affected the result.

In our own country the Exchequer rule spasmodically persists; courts disavow it from time to time and then return to it. The result is that in point of time-consumption and mental effort the law of evidence is a kind of pivotal point of every trial.

The meaningless mumble of the objection as incompetent, irrelevant and immaterial sounds through our court rooms like the drone of destroying locusts.

I have found it well nigh impossible by individual effort to make the slightest impress on this habit. By contrast I recall the trial of an accident case I heard in England. A witness was asked to describe the accident and then was asked: "To what do you attribute the accident?" The answer was succinctly given that the chauffeur had not been looking where he was going. I should like to parallel that incident in an American court. The witness would be asked what he saw; he would probably endeavor to say that he saw the chauffeur was not looking where he was going. A motion to strike this out as a conclusion would be promptly made and promptly granted. The question would be repeated. The bewildered witness would again approximate to a statement of what he really thought he saw, namely, that the chauffeur had not been looking; a new motion to strike out made and granted would be followed by an admonition of the trial Court to the witness to be careful not to give his conclusion, but only what he saw, and the situation would end with the collapse of a witness, now no longer bewildered, but utterly stupefied by the absurdity of a system of law which would not permit him to tell the story of the accident exactly as he would relate it to any human being in the world.

I ask, therefore, that the profession realize that most of the objections urged upon trial are futile and meaningless and that we should reform ourselves in this respect by just ceasing to make them. We should also cease requiring our adversaries to formulate hypothetical questions when the same result can be more simply achieved by a mere request for the opinion of the expert, and that the unspeakable practice of making your adversary prove a fact, even if you know it is provable, be eradicated among all decent members of the profession.

I pass to another phase.—Not content with preserving trial by jury in civil contract cases, with this over-emphasis on the adjective law of evidence, we, in most states, including our own, deny to the

14. Thayer, Preliminary Treatise on Evidence, p. 91, n. 7.
15. Thayer, Preliminary Treatise on Evidence, p. 94.
16. Wigmore: New Trials for Erroneous Rulings on Evidence, 3 Columbia Law Review, 423, 435.

jury the slightest assistance by forbidding the judge to comment on the evidence. Dean Pound attributes the origin of this curious survival to Puritanism. He writes[17]: "In our legal procedure, this Puritan jealousy of the magistrate has taken an extreme form as jealousy of the judge. The ideal judge is conceived of as a pure machine. Being a human machine and in consequence tainted with original sin, he must be allowed no scope whatever for free action." Our law of procedure distrusts the judge so profoundly that, again to quote the Dean, "The sporting theory of justice, the 'instinct of giving the game fair play', as Prof. Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet. . . . Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interests of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. . . . It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived. The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly? If any material infraction is discovered, just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play."[18]

The profession must restore to the judge his power to function as a minister of justice and not as a mere presiding officer.

The same formalism which has undermined our system of trials has sapped our interlocutory practice. We passed statutes liberalizing examination before trial and discovery. They were followed by appeal upon appeal, resulting in opinion after opinion, refining and defining the legalistic language of the amendments. In every branch of our interlocutory proceeding, we are confronted with the same situation. We look with wonder and admiration at the practice in England, informal and flexible, where parties come in before a master, are told what they must do, do it, and after it is done go to trial. By contrast, the percentage of practice appeals in the Appellate Division, First Department, is staggering. In 1926 it heard 1,440 appeals. Of these, 576, or 40%, were from interlocutory determinations below. In addition to this, there were 109 other appeals (either from judgments or orders) which involved motions addressed to the pleadings (exclusive of Rule 113). This leaves only 52% appeals from final judgments and orders. An analysis of the non-enumerated calendar for the first four months of 1927 shows that 25% of these appeals involved bills of particulars, discovery and inspection, and examinations before trial. Another 15% involved attempts to facilitate the speedy and efficient mode of trying cases (interpleader, consolidation, reference, parties, venue, framed issues). Another 13% involved calendar motions, preferences, stays, amended pleadings, cases on appeal—a total of 50% of pure practice squabbles.

These appellate court statistics merely reflect the bedlam of motions made in the courts below. The number of motions addressed to our Special Term is as stupendous as it is unnecessary. Take the one item of bills of particulars in ordinary negligence cases. Practically every lawyer at the bar knows exactly what particulars the plaintiff should furnish and exactly what particulars the defendant has a right to demand; and yet because of a quibble about some inconsequential phase of a demand there are scores of these motions upon the motion calendar every court day in the year. Some idea of the futile contentiousness of the interlocutory practice may be gleaned from the following figures: In one typical month 3,936 motions were submitted to the Special Term in Manhattan; of this number 41 6/10%, nearly one-half, were motions for bills of particulars; 33% were adjourned and 26% were defaulted; so that, in effect,, of the motions which were actually submitted or argued nearly 40% were granted by default. One queries with wonder why it was necessary to bring most of them on. The difficulty again is the psychology of the profession. There is no give and take; there is no endeavor to be practical, to save time and to get the result; there is much of the spirit of demanding everything you can possibly think of on the one side and of giving nothing on the other just because the adversary demanded it.

The over-contentiousness of the profession is seen again in the number of appeals generally. We are appeal-mad in this country, not merely with respect to interlocutory proceedings, but with respect to final judgments. There is no disposition on anybody's part to let well enough alone. An appeal on the off chance that some error may somewhere be found is a matter of course. I cannot give you statistics, but I can say that the number of appeals to the Appellate Division which raise no substantial question at all is startling. The waste of time, of money and of effort in futile appeals is staggering.

Now the causes of all this have been thoroughly investigated and clearly stated by the scholars of the profession. The preservation of jury trial where it is inappropriate, the prohibition of comment upon the evidence by the trial judge, the excessive tendency to appeal, all these are due in part to the innate distrust of the magistrate. The American psychology of distrust of the magistrate must end. That is one reason why reform necessitates a change in the lay attitude toward the profession. We have got to see to it that we get good judges and let them function; and when I say "we", I mean not only the profession, but the lay public as well. It is our duty to bring home to the lay public a realization of the fact that it is they who suffer ultimately from the preservation of a system that they have grown to think is for their interest and protection. We must bring the lay public to a realization that a trial is not a game or a contest of wits, but is as much a practical, hard, every-day job as is the manufacture of an article of merchandise.

Now to what does all this lead? Scholars have written and Bar Associations have passed resolutions on law reform. We have had research and investigation until the truth is as clear as the noon-

17. Some Principles of Procedural Reform, 4 Ill. L. R. 288, 297.
18. Pound: The Causes of Popular Dissatisfaction with the Administration of Justice, 29th Annual Meeting of American Bar Association, 1906.

day sun. There is nothing novel in anything I have said tonight of the causes of our difficulty.

What I emphasize, however, is that the letter killeth and that the spirit giveth life. What we need is a *will to reform.*

If we have that will, reform will come largely without any change in statute or rule.

A united and co-operating Bar, backed by an informed public opinion, could sweep away our difficulties over night, and no legislative enactment will sweep them away unless we have this new professional spirit. I venture to propose that the time has come for the profession to act and to adopt it. I appeal not solely to the profession's altruistic sense of duty and obligation, but to its self-interest as well. As the mass of ineffective and wasteful litigation increases, the number of great and important causes becomes smaller. Nothing is less profitable in a law office than small litigation, and we are coming more and more to the day of small litigation because the leaders of business and the profession alike simply have not the time or the inclination to invoke the aid of a system of law administration as wasteful as our present American system. To what a shocking level of inconsequentiality our litigation had fallen is evident from the experience following the legislation of last year increasing the cost of jury trial by $25. The enactment of this statute was followed by a reduction of 75% in the number of issues filed for jury trial. The monthly addition to the trial calendar of the Supreme Court, for our county, is today approximately one-quarter of what it was a year ago.

And so I repeat that the duty of the profession to reform arises not only from its public obligation, but from its enlightened self-interest. Our immediate function is to arouse public opinion within and without the profession. There should be enrolled under our banner every member of the profession that can be reached and also those organizations of laymen which give attention to problems of law administration.

That will to reform and its concomitant mechanism must become tenets of a faith.

We must organize as the expounders of a creed groups of lawyers, supported by laymen, who will bind themselves together for such statutory reform as may be needed; but far more important, far deeper and far more vital, who will pledge themselves in the administratoin of justice to carry into practice this new psychology of reform freely, unreservedly and in good faith.

I suggest a credo for our professional brethren:

"I will join with my adversary in waiving a jury trial wherever and whenever it can possibly be done without the sacrifice of a fundamental right.

"I will join with my adversary in supporting a trial justice in fair comment upon the evidence and reasonable direction to a jury on the facts.

"I will join with my adversary in fair concession of undisputed facts.

"I will not put an adversary to his proof in respect to facts whose existence my client admits.

"I will refrain from merely formal or technical objection to the admission of evidence.

"I will co-operate with the trial justice and my adversary to secure a speedy, prompt and complete presentation of the facts of the case.

"I will neither make nor oppose interlocutory motions unless they are of real and practical importance.

"I will take no appeal unless I am satisfied that substantial error has been committed and that a new trial should reasonably give a different result."

I profoundly believe that there is no one within sound of my voice who does not know that if we were called upon to take an oath to support this credo, as the physician takes the Hippocratic oath, the machinery of justice would once more run smoothly. Let us organize to take it, cause our fellows to join with us and then translate this new spirit into the action of our every-day lives.

The time has come. Let us act; and act as befits an ancient and honored profession, dedicating itself to give justice to mankind.

Present Practical Utility of Restatements

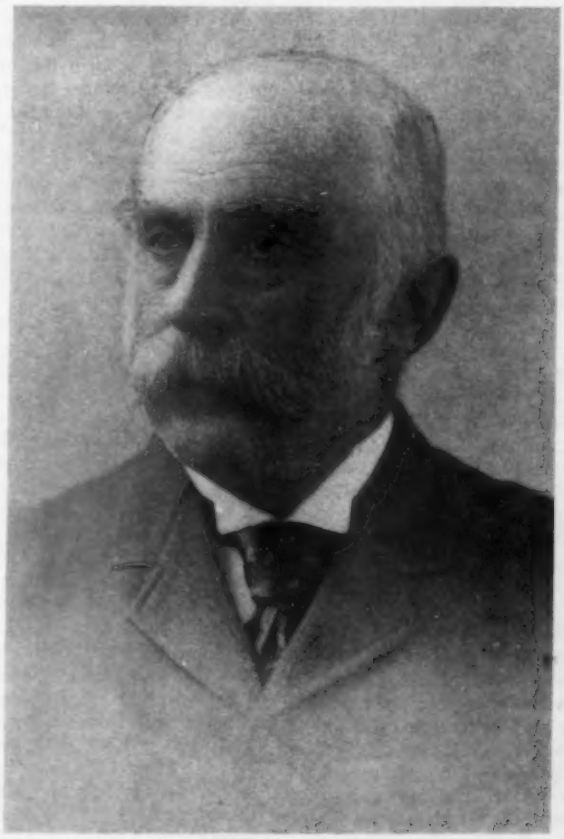
That the Restatements issued by the American Law Institute are even now, though not in final form, capable of furnishing practical assistance to the lawyer, is asserted in a recent report of the Special Committee on Co-operation with the American Law Institute of the Nebraska Bar Association. The committee, composed of Messrs. Charles A. Goss, Henry H. Foster and Maurice H. Merrill, has this to say of the scope and purpose of the undertaking:

"The American Law Institute is engaged in the task of attempting to bring some order out of the chaos of the more than one million cases decided by the courts of the national government and the 48 states of our Union. It is attempting the restatement of important fields of the common law in terms simpler, clearer and better adapted to the needs of modern life. The Institute has employed the most distinguished American legal scholars in the task. The membership of the Institute includes the President and Executive Committee of the American Bar Association, the United States Supreme Court, the chief justice of the highest court of each state, the president of each state bar association, the dean of each school belonging to the Association of American Law Schools and some 600 or more distinguished lawyers or judges elected from the profession. Tentative restatements have already been issued. These restatements, both as to form and substance, have been discussed numberless times by committees of experts, and have been passed upon, revised and approved by the Executive Council and by the whole body of the Institute. The Institute desires help from every quarter and is anxious that every American lawyer who has suggestions to make be given an opportunity to aid in this work, so that when it is finished it will represent the consensus of American legal scholarship, supported by the great mass of the bench and bar of this country. While the restatements have not as yet reached their final form, they are even now capable of being used as aids in the actual reaching of decisions in pending cases. An annotation of a restatement comparing the text of the restatement with the holdings of the Nebraska Supreme Court would be a distinct service to both the Nebraska bar and to the Institute."

JAMES C. CARTER: SEVENTEENTH PRESIDENT OF ASSOCIATION

MEMORIAL PREPARED BY THE LATE JOSEPH H. CHOATE*

JAMES COOLIDGE CARTER was born at Lancaster in the State of Massachusetts, on October 14th, 1827, and died in New York City, February 14th, 1905—his life covering a period of seventy-seven years and four months, just two-thirds of the existence of the Government of the United States. He thus lived during the administration of twenty of our twenty-five Presidents. In this single lifetime our country grew from twenty-four states, with 12,000,000 of people, to forty-five, with 80,000,000 and 10,000,000 more in our conquered dependencies—made material progress such as no equal period of the world has witnessed in any country, and became a world power ready and able to take a just and leading part in international affairs. Mr. Carter, coming into life with no advantages whatever but his own natural gifts stimulated by poverty and the spur of necessity, grew with the growth of the country and by sheer force of brains and character, had become at the time of his death one of her best known and most valued citizens, the acknowledged leader of the great profession of the law, foremost among its 110,000 votaries—and exercising a wide and powerful influence for good among the people of his time. Such a career is no accident, and it is as interesting to recall as briefly as possible the steps by which he rose from obscurity to national and international distincton.



JAMES COOLIDGE CARTER

When I entered Harvard College in 1848, Mr. Carter, who had already been there for two years, was a very marked man among the three hundred students who then constituted the entire community of that little college. To very commanding abilities he added untiring industry, and to lofty character most pleasing manners, a combination which made him easily foremost. He was filled with an honorable ambition, and took all the prizes, and not content with perfection in the college curriculum, he took an interest in the public questions of the day, and cultivated the art of public speaking with discriminating assiduity. Like all the young men of that day he was a devoted admirer of Mr. Webster, who did more than any other man to kindle the patriotism and arouse the national spirit of the younger generation, and I always thought that he modeled himself upon that noble example in style, in expression and in the mode of treating every question that arose. Indeed in his last years I regarded him as the last survivor of the Websterian School. Dr. Storrs, who died some years before him, was another example of that noble school, and if he had followed the law as he began it, he would have been just such another lawyer as Carter, and his most formidable rival.

From lack of means, Mr. Carter found it a hard struggle to get through college, and even to enter it. For this reason he came two years late, having, I believe, engaged in some commercial employment to enable him to enter. He did not hesitate to avail himself of the generous aid of an admiring fellow townsman who recognized his great qualities, and meant that they should not be lost to the world. Just as Rufus Choate once told me, that it would be better to borrow the money for your college education at ten per cent. compound interest than not to get the education at all.

Well, seeing his manifest ability, his spirited and attractive personality, and his sympathetic interest in all our college affairs, we all recognized him as our leader. He exercised a potent influence upon all his companions. He was made Class Orator at Commencement—and entered upon life with assured prospects of success. But still the lack of means was an obstacle to his immediate entrance upon the profession of the law, to which he looked forward as the only one possible for him. I believe that he never had a thought of any other occupation

*Printed in the Year Book (1906) of the Association of the Bar of the City of New York. Courtesy of that association.

in life. So, upon graduating he betook himself to teaching as a necessary means to that great end.

It is interesting to read the letter which Judge Willard Phillips, a great jurist and author of the leading work on marine insurance, gave him to the gentleman in New York who had applied to him to recommend a teacher in his family. The letter bears date June, 1850, just before he graduated. It says:

"The young gentleman who has been spoken with for instruction in your family is Mr. James C. Carter, of Lancaster, Mass., a member of the Senior Class. He can teach all the branches of English education and the classics, he is, as Professor Pierce assures me a thoroughly educated, talented, accomplished, sensible and pleasing young gentleman, of good principles and high morals."

How many of us have had our first steps in life smoothed by just such letters!

At the same time that he took this engagement for a year's service as a teacher in the summer of 1850, he entered the office of Kent & Davies as a student, but his attendance there was only nominal. This firm was composed of Henry E. Davies, afterwards Chief Judge of the Court of Appeals, and William Kent, the son of the Chancellor, who had been at one time a Circuit Judge, before the adoption of the Constitution of 1846. He always spoke of Judge Davies with great respect and esteem, but he simply loved Judge Kent, of whom he always spoke to me in terms of unbounded affection and admiration.

He remained in New York teaching till the autumn of 1851, when he entered the Dane Law School at Harvard and remained there three terms till the spring of 1853—so that I was with him there again for six months, and had full opportunity to observe that the same qualities which had made him so distinguished in college, to which was now added an unbounded enthusiasm for the law, made him still a leading and commanding spirit among his new associates.

What an impression he had left at the office in New York, in spite of his scanty attendance there, appears from the fact that in February, 1853, Mr. Davies visited the Law School and said that he had come on to see Mr. Carter—that his firm of Kent & Davies was about to dissolve—that he was going to take Henry J. Scudder as junior partner and wanted Mr. Carter to come to him as managing clerk. Mr. Carter accepted the position, and was soon after admitted to the Bar in New York. In 1854, Mr. Davies withdrew, to become Corporation Counsel, and the firm of Scudder & Carter was formed, with whom it was my good fortune to study the Code in the following year. This firm under its successive organizations of Scudder and Carter, Carter and Ledyard, Carter, Rollins and Ledyard, Ledyard and Milburn has occupied a great place in the annals of the profession in New York.

But the firm of Scudder and Carter, started in 1854, substantially as a new firm, and Mr. Carter instead of deriving any special benefit from it at the outset in his career at the Bar, had to make his own way there. It served as a good personal introduction to the profession, by whom he was received in that cordial and hospitable spirit which, when our Bar was smaller was more characteristic of it.

He made no brilliant début in the courts as Mr. Evarts had done in the celebrated Monroe Edwards case. He was not plunged at once into a great volume of business as some of us were who joined as juniors, old and long established firms, the elder members of which were already overworked. He had to paddle his own canoe and work his way up stream. But slowly and surely on a solid basis of work well done, he advanced step by step, and soon came to be recognized by his seniors at the Bar, by such men as Daniel Lord and O'Conor and Cutting and William M. Evarts and William Curtis Noyes, as a young man who must be reckoned with, and as a foeman likely to be worthy to meet them in any cause.

From the first he aimed at nothing short of perfection in everything he undertook, and as his ideals were high, and his conscience supreme, this involved an amount of labor and self absorption seldom if ever exceeded. In those days he had but few social duties or pleasures to distract him from minding the main chance, success on the forensic side of the profession, and to that he was able and eager to devote all his energies of mind and body. I know of no lawyer whose success was more fairly earned or more thoroughly deserved, or less derived from adventitious sources or external aid. By his own might he worked his way to the front. Let me try very briefly to trace the personal qualities which were the weapons by which he won the victory. For I have known personally all the lawyers in New York who for the last fifty years have one after another been foremost among us—and no two of them were alike.

Well, he had a very sound mind in a very sound body. But those are the common and necessary requisites of any measure of success. His mental endowments were of a very superior and splendid quality, and he appreciated his own intellectual powers and revelled in the exercise of them. Thinking, which to most of us is a painful and tiresome process, he delighted in, and pursued it as a most fascinating game. His mind was of a decidedly philosophical turn, fond of considering and solving all the problems of human society and progress—and the reasoning powers which in most of us are dwarfed or twisted, in him were naturally and fully developed. Logic as a pastime was as acceptable to him as golf or bridge is to the average man today.

He was undoubtedly extremely ambitious—but his ambition was of a very high order and made of the sternest kind of stuff. He would not stoop to conquer and disdained to climb by unworthy means. His nature was robust and his disposition combative, so that he loved the contests of the forum and its triumphs and trophies were a great joy to him. He eagerly seized the palm of victory, but with him it was always *palma non sine pulvere*, and always fairly won.

His conscience was as clear as crystal, and never went back on him, as it sometimes does on men whose mental vision is less clear than his.

Absolute independence was the controlling feature of Mr. Carter's mind and character. It marked and guided his whole conduct, professional, public and personal. He must act on his own carefully matured judgment, no matter with whom or with what it brought him in conflict—and he had the courage which naturally accompanies such independence of character.

He was not without a large share of self-asser-

tion, and yet was one of the most unselfish of men.

Imbued with a high sense of public duty, and most ardently patriotic, he studied with keen interest public questions as they arose from time to time, and was ever willing to give his fellow citizens the benefit of his opinion, but he never sought office and he never allowed his interest in public affairs to distract him for a moment from the pursuit of his chosen profession, well knowing what a jealous mistress the law is.

His power of labor was prodigious, and as he had given no hostages to fortune in the shape of wife and children, he was always ready and able to serve his clients and the cause of justice with relentless devotion.

By nature warm hearted and magnanimous, he was one of the most loyal and persistent of friends, and in spite of his contentious life, I never heard of his having an enemy. He was too just and generous for that.

These excellent mental, moral and physical endowments were the effective instruments by which he worked his way to fame and fortune.

His professional conduct and habits were just what you would have expected from such a character. He honored and magnified his profession, and fully recognized the debt which, as Lord Bacon says, we all owe to it. He scorned all mean and trifling arts, and relied solely on the merits of his cause and his own prowess in maintaining it.

He had a unique habit when he had embarked in a cause, of first convincing himself of its justice, before he undertook to convince court, or jury, or adversary. He was very far from limiting himself to causes that he thought he could win, or to such as were sound in law or right in fact. No genuine advocate that I know of has ever done that. He recognized and maintained the true relation of the advocate to the courts and the community, that it is a strictly professional relation, and that either side of any cause that a court may hear, the advocate may properly maintain. For him newspaper clamor had no terrors. He realized that the newspaper is accuser, judge and executioner, all in one, but for all that he could and did maintain the unpopular side of a controversy with the same zeal and fidelity, as if the whole press were backing his client's aims. As his fame increased he was called, like the leading physicians, into the most grave and critical cases —and I have no doubt that he lost in the long run more cases than he won. But having once undertaken the conduct of a case he made a careful study of it to try to build upon the facts a theory consistent with his own sense of right and justice, which he might fairly and earnestly present to the favorable consideration of the court—and in this he generally succeeded—and having once convinced himself, he could apply all the clearness, force and earnestness of which he was master to convince the tribunal, whether court or jury.

He had such reliance on his own judgment, and confidence in his own opinion, that when he had once found the theory satisfactory to his own mind, on which he ought to present the cause, he never changed or departed from it, no matter what arguments the other side might present, or what decisions the court might make as the cause progressed; and even when the court of last resort had pronounced against him, he bowed to the law which the court by reason of its power had declared, but still maintained the theory which by the power of his reason he had evolved in the case. This forensic habit often gave to his weaker adversaries, who could tack and trim their sails as the judicial breezes changed, an apparent advantage. He would present his case on the first and second appeal, more strongly and more forcibly, of course, but it was always the same view of the same case, and we knew exactly where and how we should have to strike to meet it. This absolute reliance on his own judgment sometime led him to underrate the force of his opponent's position. He regarded and treated the propositions of his adversary as "notions," and was surprised and indignant when they commanded the approval of the court.

In another respect, also, he sometimes in the arena exposed to his adversary a vulnerable flank. So masterly was his independence of mind and character, that he was not always willing to admit or to recognize the binding force of precedents, however numerous, which failed to run the gauntlet of his own reasoning powers. One of his favorite maxims was that nothing was finally decided until it was decided right, and so no amount of so-called authorities was sufficient to dissuade him from maintaining the contrary view.

So earnest and zealous and well sustained was his advocacy that he sometimes presented the appearance of seeming to drive the court, which a weak judge would resent, and take refuge in his power to decide, while a strong judge would lock horns with him on the spot.

Mr. Carter's forensic character was a most interesting one to study, and it was always hard to say in the particular case whether those features, which seemed to give his adversary an advantage, were elements of strength or of weakness. But on the whole, he grew to be the most formidable advocate, in both the State and Federal courts, and was, I think, so recognized throughout the country.

My judgment of him in this respect is confirmed by a review of the cases in which he was constantly engaged. They were mostly leading cases of great difficulty, magnitude and danger, involving the severest responsibility, and challenging the best powers of the advocate. A mere list of their titles recalls their overwhelming importance, and the prodigious labor that must have been involved in their preparation and argument. In all the important branches of the law, he seemed to be equally at home. Great maritime and commercial causes, great railroad controversies and, above all, great constitutional cases were constantly engrossing his attention and taxing his powers. His sense of duty and justice to his clients was shown, not only by his exhaustless labors in their behalf, but by the extreme moderation of his fees and charges. We used sometimes to think that in his careful consideration for his clients, he hardly did justice to the profession; and in this respect, by the great weight of his reputation and example, rather lowered the standard which we, with a more realizing sense of the wants of life, desired always to see highly advanced. But as long as lofty character, commanding abilities, and loyalty to the profession and to the truth constitute just and abiding claims to the admiration of lawyers and of laymen, we shall always be proud of his leadership and grateful for his

example. A nobler model, on which young advocates may mould their careers, cannot be found in legal annals.

Early in his professional career, Mr. Carter's splendid talents and faculties attracted the special attention of the great leaders of that day, and particularly of Mr. Charles O'Conor, who was pre-eminent among them, not merely for profound erudition, but also for an experience seldom equaled, in all branches of the law, for his keen and subtle learning, and for his supreme contempt of all shams and false pretences in the way of the profession. He saw in Mr. Carter a kindred spirit, and a junior upon whom he could rely for thoroughness equal to his own—for inexhaustible power of labor, and for absolute devotion to any cause which he undertook, and they soon became co-laborers in several causes of unique magnitude, importance and difficulty. Probably no lawyer then at the bar was so exacting of himself or of his juniors in the preparation and trial of a cause as Mr. O'Conor, and Mr. Carter fully satisfied his most strenuous demands. In the great cause of the City against Tweed, to establish the claims of the City for that long series of deep-laid frauds and peculations by which, through a period of many years, it had been robbed of millions—a trial which extended through several weeks and involved an examination of the most complicated system of thefts which had been exposed by the ingenious researches of Governor Tilden; the combined powers of Mr. Peckham, Mr. Carter and Mr. O'Conor were drawn upon to their utmost to unravel the tangled skein.

Mr. Carter's intimate and constant association with Mr. O'Conor, and laboring with him through many years, had a marked and lasting effect upon the younger man—as such associations generally do have. The modes of thought and study, the absolute thoroughness, the exhaustless research, the style of speech, and even the modes of utterance, and expression of feature and mode of gesticulation of the younger man carried always a suggestion of his great senior. Of course it was only an unintended and unconscious resemblance—for Mr. Carter was a much broader and fuller man than Mr. O'Conor, much more highly and generally educated, and more full of sympathy and sentiment—a bigger hearted man and built on a larger scale. And yet, what he thus insensibly imbibed or absorbed from Mr. O'Conor did strongly characterize his forensic conduct and style—and always recalled an impression of the great Irish advocate.

Before the trial of the Tweed case, another tremendous cause, still more laborious, absorbing and exciting had arisen—the Jumel Will Case, and in this, in all its various forms from beginning to end, Mr. Carter and Mr. O'Conor were constantly associated, and bore between them the whole brunt and burden of the arduous contest. It involved not only the most difficult and diverse questions of law that called for great learning and study, but issues of fact of a highly dangerous and complicated character; questions of pedigree, marriage, paternity and consanguinity—dependent for their solution upon old and doubtful documents and papers, upon the fading memory of aged witnesses, upon history and tradition, and upon gatherings from the border line of evidence—all appealing strongly to the imagination as well as to the reason of the advocate; and there is no doubt that to this whole range of study and preparation, and to the final success of the case, Mr. Carter contributed, at least, his full share.

But he paid a bitter penalty for these splendid achievements and triumphs, for, taken with his own regular practice, which was already large, this additional burden proved too much for even his marvelous power of labor, and it ended in a truly tragical catastrophe. The exciting trial of the Jumel case attracted great popular interest, and engaged the attention of Judge Shipman and a jury in the United States Circuit Court for many weeks. The long hours of every day in court were a constant nervous strain, and the longer hours of every night were protracted vigils of labor,—with an utter disregard of the commonest laws of health, even of the universal rule that the only cure for fatigue is rest—so that the wonder was that mere flesh and blood could stand it as long as they did.

Mr. O'Conor was a rule unto himself, and reversed the usual custom, taking himself the opening of the case and throwing the summing up upon his junior so that Mr. Carter, in the true spirit of the advocate, was in his own mind summing up the case every minute from the first word of the first witness to the last word of the last, and all the while defying the demands of nature for regular food, sleep and repose. His part was splendidly performed, but when the fatal morning of the closing argument arrived, and Mr. Carter arose to address the jury, after a few halting words, it was manifest that nature could go no further, and he collapsed upon the spot, so that Mr. O'Conor, whose physique seemed to be made of gutta-percha and steel springs, had to take his place and sum up the case himself. But with the true grit and pluck that characterized him, he persevered, after a temporary recovery, in the trial of the Tweed case, and conducted a vast mass of litigation for the City besides, which resulted in a more disastrous breakdown, and for a period of nearly three years he appeared no more at the Bar or in New York. All his unique power of labor had disappeared—he was incapable of the least exertion, and his friends who saw him in the interval hardly dared hope that he would reappear in the arena whose contests were so dear to him.

But his splendid constitution contained such reservoirs of strength and such living springs of vigor that in 1880, after three years of complete retirement, he came once more upon the scene, fully armed and equipped and ready for new contests. In truth, his long period of retirement and repose seemed to have renewed and invigorated all his powers. So that he entered upon another twenty years of professional achievement of the very highest order and dignity, which he sustained with new and constant safeguards of repose and sport and exercise, the neglect of which had so nearly proved fatal to him before.

From 1880 to 1900 his employment in the courts, State and Federal, was constant in cases of the greatest magnitude and importance, a mere enumeration of which (and I append a partial list of them), demonstrates that he was all the while a most potent factor in the development of the law and the settlement of momentous constitutional questions. The most important of these were Langdon vs. The Mayor, which determined the respective rights of the city and of the riparian proprietors in the extension of the dock lines on both rivers; the Nebraska Rate Case; the cases of the North River Sugar Refining Company, and the Aqueduct Case; the Income Tax Case; the Tilden Will, the Joint Traffic Case and the Trans-Missouri Case—and these alone involved an amount of labor and study that is most appalling. But his vigor seemed

rather to increase with his years, and he was more than adequate to all the demands upon him.

And all these great and conspicuous cases conducted with exquisite professional skill, with unfailing courage and courtesy, and with all the eloquence that earnest conviction and ever youthful enthusiasm could arouse, established his fame as a lawyer throughout the country, on a basis as nearly imperishable as any lawyer's ever can be. But his employment in 1893, as one of the chief counsel of the United States before the Tribunal established by the Treaty with Great Britain for the settlement of the long vexed Behring Sea dispute in regard to the Seal Fisheries—and the characteristic manner in which he performed that great service, gave him an international reputation of the highest value. He was associated with Edward J. Phelps and Frederic R. Coudert, and to oppose them Great Britain, as she always does on such occasions, selected her best, in the persons of Sir Charles Russell and Sir Richard Webster, both afterwards Lord Chief Justices of England under the names of Lord Russell of Killowen and Lord Alverstone. Both of those gentlemen have often expressed to me their profound appreciation and admiration of Mr. Carter's ability and forensic faculties, as displayed in that great international cause, and their warm friendship for him, which grew out of their protracted and intimate acquaintance with him in the course of it—in which he showed himself as the great lawyer and gentleman. The contestants were admirably matched, but the balance of the cause was most unequal, for our counsel had to rest their case upon the claim of property right in the seals, accruing to the United States from their being bred upon the Pribiloff Islands which we had acquired from Russia as part of the Alaska purchase, and our consequent right and duty to protect them wherever found on the high seas, to the extent that we might replevy them at the South Pole, and by force prevent any interference with them by vessels of other nations pursuing the business of pelagic sealing. The authority for the first proposition at common law was of the most meagre character, while there had certainly been no international agreement to the second proposition.

Great Britain relied upon the universally established doctrine of the freedom of the seas, and upon the proposition that the right of fishing on the high seas could not be interfered with except by the common consent of nations restraining the right.

We certainly had the strongest moral grounds for claiming the protection of the herd of seals from destruction, on our own account and on account of the world at large—and if the case could have been decided upon what ought to have been international law, our contention would have been more hopeful—indeed irresistible.

It was just the case for the exercise of Mr. Carter's characteristic qualities and methods in their very finest and highest forms. It fell to his lot in the division of labor between our counsel to open the case, which he did in a most exhaustive and eloquent argument of seven days. The preparation which this involved was incredible—for his argument contained an exhaustive history of the controversy, a complete narrative of Russian and American rule in Behring Sea for nearly a hundred years, and exploration of the habits of seals and of seal fishing during the entire period, a discussion of the principles of international law bearing nearly or remotely on the subject of dispute, the origin and growth of the right of property, particularly in animals, and the interpretation and effect of all treaties and regulations bearing upon the questions involved. It is needless to say that after months of toilsome preparation, Mr. Carter came to the argument with a theory of the case which, to his own mind, was absolutely irresistible, and pressed it upon the Tribunal with an eloquence, earnestness and force which even he had never equaled, that his splendid gifts of imagination and illustration were brought into play with graphic power, and that if we could have won the case by demonstrating what international law ought to have been, and what expediency, humanity and civilization demanded in the particular case, it was more than demonstrated. His argument, like all his arguments at the Bar from the beginning, was extremely dignified and pitched upon a very lofty plane of morals and right. But he was storming an impregnable citadel, when he sought to diminish the freedom of the seas without the warrant of an international agreement to that effect. It is greatly to be regretted that his labors could not have resulted in an effective agreement between the nations to that effect, so far as pelagic sealing was concerned, for the herds have already nearly vanished from the islands, and the industry, most useful under proper limits, has been well nigh destroyed.

The time prescribed to me will hardly permit even an allusion to the great services rendered by Mr. Carter in maintaining by precept and example the dignity of the profession, and its protection from everything unworthy, in preserving the common law in its integrity as the basis and method of our jurisprudence, and rescuing it from the destructive assaults of the wholesale codifier; in his constant and courageous warfare against everything that looked like corruption in the courts or in the profession; in his active participation in the foundation of this Association, as the bulwark of a sound and pure administration of justice; in his service again and again as its President, and in his persistent and successful efforts at all times to keep it up to the mark, and to achieve through its instrumentality the lofty objects of its founders.

It is melancholy to think how fast the memory of all this splendid service and achievement, of which I have given such a meagre and inadequate sketch, is fading away. He had for the last six or seven years of his life retired absolutely from the practice of his profession, so that to the younger members of the Bar his face and figure, which had once been so familiar in the courts, were almost unknown.

But in these years of retirement rendered necessary by constant threats of a return of the malady which had once laid him so low, he was never idle. He enjoyed these later years in the heartiest manner, spending a large part of each of them in outdoor life and sports which he had learned to love so well, and to value so highly, as the only safeguards of declining health. But all the while his heart and mind were intent upon a great work, which he has left as a legacy to the profession, and which, if I am not mistaken, will long perpetuate his reputation as a jurist.

In a course of carefully prepared lectures on the philosophy of the law, which I have had the privilege of reading, completed just before his death, and intended to be delivered at the Harvard Law School, he has embodied the rich fruits of his ripe experience and learning, of which it will be an enduring monument. He has explored and portrayed the whole history of human conduct in support of his favorite theory that law instead of being a "command" as defined by Austin, and other distinguished writers upon the subject, is entirely the growth of custom and of public opinion, that

the common law as developed by English and American courts is the wisest and safest form of administering justice, and best adapted to the ever changing needs and exigencies of human society, and that all attempts to substitute in its place a rigid and crystallized condification in any form, must necessarily fail of their object. In this effort he has garnered up all the wealth of learning, of imagination, of common sense and of foresight, which in his long and busy life, devoted to his divine mistress, he had made his own. It is delightful to think that this masterpiece of legal literature, practically perfect as it came from his hand, will transmit some knowledge of the man to future generations, when all the great controversies in which he was engaged have lost their interest and been forgotten.

I have necessarily refrained from enlarging at all upon the spotless purity and manly independence of his public life and of its great and beneficent influence upon the thought of his time and of those charming and endearing traits of personal character, which made him so beloved in life and so lamented in death by all who had the great privilege of knowing him.

ARRANGEMENTS FOR SEATTLE MEETING

To Be Held at Seattle, Washington, July 25, 26, 27, 1928

HEADQUARTERS: Hotel Olympic, Fifth Avenue and Seneca Street. Rates: Single rooms, $6 to $10 per day; double rooms, $8 to $12 per day; double rooms with twin beds, $8 to $12 per day; double room with double and extra bed (for two, three or four persons), $10.50 to $13.50 per day; parlor suites, $20 per day up. All rooms have tub or shower bath and outside location.

Reservations and Hotel Information

Requests for reservations and information concerning the Olympic and other Seattle hotels should be addressed to the secretary, William P. MacCracken, Jr., 209 South La Salle Street, Chicago, Illinois.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations stating (1) whether double or single room is wanted and if double the names of persons who will occupy it; (2) whether double or twin beds are preferred; (3) the approximate rate; (4) date of arrival, including definite information as to whether such arrival will be in the morning or evening; (5) whether upper or lower floor is preferred.

Members are requested to specify *second choice* of hotel in making requests for reservations.

Every effort will be made to comply with requests made, as far as available accommodations will permit. Reservations should be made as early as possible.

Summer tourist tickets at reduced rates will be in effect from all states except Oregon, Washington and northern California. Tickets on sale daily from May 22 to September 30, inclusive, with return limit October 31, 1928. Individual identification certificates will be sent members in Washington, Oregon and northern California, enabling them to secure a reduction of 25 percent.

National Conference of Commissioners on Uniform State Laws

The Conference will be held at Seattle on July 17-23, as announced by Secretary Bogert after the meeting of the Executive Committee of the Conference last January.

The Headquarters of the Conference will be the Olympic Hotel, which will also be the headquarters of the American Bar Association.

Reservations of hotel rooms and also reservations of places on the Special Train of the Commissioners should be made through William P. MacCracken, Jr., Secretary of the American Bar Association, 209 So. La Salle St., Chicago, Ill.

The tentative program of the coming Conference was printed in the January issue of the Journal. Certain amendments have been made therein and the amended program will be published in the April issue.

ADDITIONAL HOTEL ACCOMMODATIONS

Hotel	Distance from Headquarters	With Bath		
		Single	Double	Twin Beds
Ambassador	4½ Blocks	$3 to $5	$5, $6, $7	$8
Caledonian	3½ Blocks	$3 to $5	$5, $6	$7.50
Calhoun	7 Blocks	$3 to $5	$5, $6	
Camlin	7½ Blocks	$6, $7, $8	$8, $9, $10	$8, $9, $10
Frye	8 Blocks	$3 to $5	$5, $6	$7, $8
Gowman	6 Blocks	$5, $6	$5, $6	$6, $7
Moore	6½ Blocks	$3 to $5	$6	$7
New Washington	6 Blocks	$6	$8	$9, $10
New Richmond	10 Blocks	$3 to $4	$5, $6	$6, $7
Savoy	2 Blocks	$3 to $5	$5 to $6	$6, $7
Vance	7 Blocks	$4	$5, $6	$6
Waldorf	5 Blocks	$3, $4	$4, $5	$6

TRADE ASSOCIATION STATISTICS: THE LEGAL ASPECTS

General Legal Approval Now Accorded Statistical Reporting as a Trade Association Activity, When Exercised Within Proper Limits—Important Features Determining Legality or Illegality of Activities of Defendant Associations, as Shown by Supreme Court Decisions—Troublesome Question Raised by Reporting of Specific Job Contracts of Cement Case

By Benjamin S. Kirsh*
Of the New York City Bar

THE recent publication by the Department of Commerce of a revised edition of Trade Association Activities[1] directs attention to the present legal status of trade association programs and practices. Although less than five years have elapsed since the appearance of the first edition[2] in 1923, two leading decisions of the Supreme Court of the United States, delivered in the intervening period, mark a distinct turning point in the judicial attitude concerning trade association activities. If it is too early, at the present writing, to refer to the Maple Flooring[3] and Cement[4] cases as definitive, it may perhaps be noted that they are, at any rate, basic and epochal in announcing a liberal construction of the anti-trust laws, in their application to the co-operative functions of trade associations.[5]

It is only with the aid of an historical perspective, that it can be adequately appreciated that dominant social forces leave their impress upon the law, and, that where problems of industry and commerce are involved, the legal boundaries are narrowed or widened by prevalent economic and business views.[6] These cases illustrate, accordingly, that new conceptions of individualism and social control are in the process of being moulded in the light of present day business forms.[7]

The statistical reporting activities of trade associations are, in the broadest aspects, merely the extension of quantitative measurements to the practical affairs of business, the application of a technique familiar to the methods of the natural and social sciences.[8]

No longer is it necessary, at this date, to press the contention upon the law, with the zeal of advocacy, concerning the substantial social advantages of a sound statistical reporting plan as a periodical, accurate, and reliable inventory of fundamental business conditions.[9] The opinions of Justice Stone[10] embody the judicial approval of the benefits to the industry at large and to the public, of this activity, when exercised within proper limits. Quotations of expressions of the Supreme Court will not only establish this view with clarity, but overcome the necessity of elaborate argument to plead for a conclusion which has already won favor with the courts.

"The cost of production, prompt information as to the cost of transportation, are legitimate subjects of enquiry and knowledge in any industry. So likewise is the production of the commodity in that industry, the aggregate surplus stock, and the prices at which the commodity has actually been sold in the usual course of business."[11]

"It is the consensus of opinion of economists and of many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. . . . Restraint upon free competition begins when improper use is made of that information through any concerted action which operates to restrain the freedom of action of those who buy and sell."[12]

In regarding overproduction, business instability, and wide price fluctuations as evils, and as evidences of maladjustments in the industrial and commercial structure, economic, business, and legal

*Mr. Kirsh was formerly Special Assistant to the United States Attorney in New York in the prosecution of Sherman Anti-Trust Law cases.

The author acknowledges indebtedness to David L. Podell whom he has consulted freely in the preparation of this article.

*The statistics here considered are the usual data found in trade association reporting plans, dealing with volume of production, stocks on hand, new and unfilled orders, shipments, and sales information. It should be noted, however, that credit information has been treated in another place. Podell and Kirsh, Credit Bureau Functions of Trade Associations: The Legal Aspects, St. John's Law Review, Vol. 1, No. 2, May, 1927, page 101; reprinted LXI No. 6, American Law Review, Nov.-Dec. 1927, p. 801. Uniform cost accounting data must be reserved for a further study.

1. Trade Association Activities, Government Printing office, Washington, 1927.

2. Washington, 1923.

3. Maple Flooring Manufacturers' Association, et al. v. United States, 268 U. S. 563. (1925).

4. Cement Manufacturers' Association, et al. v. United States, 268 U. S. 588. (1925)

5. These decisions, the logical present day application of the "rule of reason," are the counterpart, in the law, of the modern social and economic tendency toward collectivism. *Cf.* Bohlen, Studies in the Law of Torts, Indianapolis, 1926, page 340 et seq.

6. *Cf.* Elliott, J., in Tuttle v. Buck (1909) 107 Minn. 145.

7. See John M. Clark, Social Control of Business, Chicago, 1926, pages 30, 31.

8. "Year by year the range covered by statistical compilations has grown wider, the accuracy of reporting has improved, and the technical methods of analysis have become more refined and more powerful." Wesley C. Mitchell—Business Cycles: The Problem and the Setting, New York. (1927), page 2.

"Obviously, the trend toward standardization of technical processes and of products favors the statistician. So does the trend toward the standardization of accounting methods, a trend which is most marked in such fields as banking, railway transportation, and public utilities, where financial reports must be submitted on official forms to government bureaus. The trend toward publicity of corporate accounts, observable in business circles, promises to give us in the future more accurate knowledge of costs and profits. . . . Standardization and publicity give the statistician what he wants." *Ibid*, 198, 199.

9. A comprehensive statement of the practical value of trade association statistics is contained in Chapter III of Trade Association Activities, *supra* note 1.

10. *Cf. supra* note 3.

11. Stone, J., Maple Flooring case, *supra* note 3, page 585.

12. *Ibid*, p. 582-583.

thought have been brought into close coordination.[13] In common, they have recognized that a study of statistical knowledge will guide a member of an industry to measure his production policy according to demand rather than maximum manufacturing capacity, and his individual price policy with an intelligent relation to his costs rather on the basis of a blind, unintelligent pursuit of some rivals. In addition, from the broader social viewpoint, a more comprehensive function of statistics is to present the actuality of market conditions to producers and consumers.

Since the authoritative views of the Supreme Court have unequivocally removed whatever doubt once existed relating to the lawfulness of statistical reporting, as a trade association function, its extension, within legal boundaries, to the degree of being more exact in method, more informing in results, and as automatic signals of business activities, would therefore seem to warrant encouragement.

From the vantage point of present observation, it evokes surprise to reflect that only five or six years ago the legal validity of statistical reporting as a trade association activity was, in many quarters, open to serious question. The general legal approval now accorded, testifies to the speed of the transformation of legal thought under the imperative pressure of modern economic and business necessities.

By way of introduction, it may be stated, that, in general, in the absence of an agreement among competitive business units, or a concerted course of conduct, evidencing the wrongful purpose, either to control prices or limit production, the test of economic soundness has been largely woven into the fabric of the law, as a prime factor in determining the legal validity of statistical reporting practice. But in addition to the rigid legal rules against agreements to control prices or limit production, there may be observed, in the reported decisions, the tendency to insist upon various administrative safeguards in the enforcement of the anti-trust laws, which have caused the courts to frown upon certain features of statistical technique. These, including such practices as penal provisions compelling obedience to the group plan, a too detailed disclosure of information, or telling suggestions as to future prices or production, will be discussed in greater detail hereafter. These can so easily be made the vehicles for group pressure, that to permit their practice, would ultimately result in extracting the teeth of the anti-trust laws, and render them incapable of effective enforcement.

But with the approval by the courts, as we have seen, of the principle of statistical reporting as a sound economic activity, it would seem that the primary function of the anti-trust laws should not be directed at destroying the efficiency and value of these instruments, but rather at eliminating their abuses. The relative emphasis must therefore be to establish the presence of economic and social advantages rather than to search for technical violations of a rigid law.

In practical operation, the barriers erected by legal prohibitions now seem to exert the most potent repressive influence in stunting the growth and expansion of statistical reporting. It is to be borne in mind that, in the past, searching investigations into statistical activities have been conducted by prosecuting bodies such as the Department of Justice or the Federal Trade Commission, and it is but natural, therefore, that the relative emphasis should have been placed negatively on the illegal elements rather than constructively to ascertain the social and economic value. Thus, the real efficiency and utility of these instruments of business hang in the balance, until a clear legal policy has announced a favorable judgment, and marked out, in bolder relief, their proper scope.

In examining the cases already decided by the Supreme Court, it would be most advantageous, in the present discussion, to regard them compositely, stressing the important features which seem to have determined the legality or illegality of the aggregate of the activities of the defendant associations. While the Supreme Court has clearly stated[14] that the Maple Flooring and Cement cases[15] have not overruled or even modified the Hardwood and Linseed cases,[16] other considerations, more fundamental than the application of unchanging principles of law, have exerted a profound influence in accounting for the difference in result.[17]

It would not seem to be an adequate review to rest with the statement that the two sets of cases are distinguishable solely on the facts. In addition, it is to be observed that the later cases illustrate a judicial attitude of sympathy and understanding, found in the dissenting opinions of the earlier ones. It is, perhaps, sufficient to note that the commentators are all agreed that a new method of inquiry and a new evaluation of the social advantage of trade association enterprise, and a greater leniency in drawing inferences from the evidence, have been adopted by the Supreme Court.[18]

Thus has occurred the parting of the ways of the Courts with the emphatic view of the economist, Adam Smith, that

"people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or some contrivance to raise prices."[19]

13. The weight of authority from the representative writings of eminent economists and statisticians, as well as the ever-increasing number of expressions of business leaders, indicate a harmony of view. The following excerpts describe the general views of leading business executives so cogently that an extended quotation would seem justified:

"I believe it is an accepted principle of business in this country that it is wise to have an intelligent adaptation of supply to demand. It is obviously to the disadvantage of the producer and also of his customers to fail to take advantage of an increasing demand which will permit increased production, just as it is against his interest to produce goods substantially in excess of any demand reasonably in prospect. The result of the first course is that if the producer fails to get the advantage of his market opportunities his customers suffer from the resulting unnecessary shortage and price instability. The result of the other course is to create prices below the cost of production with injury to the producer and his employees as well as to his customers who have bought his goods at higher prices."

"One of the important functions of statistics is to afford a producer that broad survey of the situation which enables him to guide intelligently against improvident production in excess of prospective demand and toward an increase in his production when the market will absorb an increased production." (Italics ours.) First Annual Report of the President of the Cotton-Textile Institute, Inc. Walker D. Hines, page 12 et seq.

See also Collection of Business Figures, Report of Committee I, National Distribution Conference, held under auspices of Chamber of Commerce of U. S., Washington, (1925), page 12 et seq.

14. Maple Flooring case, *supra* note 3, 577 et seq. and *cf.* dissenting opinions 586 et seq.

15. *Supra* notes 3 and 4.

16. American Column & Lumber Co et al. v. United States, 257 U. S. 377; (1921) United States v. American Linseed Oil Co., et al. 262 U. S. 371. (1923)

17. *Cf.* authoritative address of Hon. George W. Wickersham, entitled Developments of the Sherman Anti-Trust Law Since 1916, delivered before the Association of the Bar of the City of New York, January 12, 1928, pp. 20 et seq., p. 21. A wide range of intelligent and helpful commentary, indicating a variety of views, can be found in the American Economic Review, Vol. XVI, No. 1, supplement, (March, 1926) page 202 et seq., and also in the Trade Associations and Business Combinations, Proceedings of the Academy of Political Science in the City of New York, Vol. XI, January, 1926, No. 4, page 555 et seq. Passim.

Cf. also for interesting legal discussions, Oliphant, Trade Associations and the Law (1926) 26 Col. L. Rev. 281; Probst, The Failure of

It can readily be appreciated that the law must rely for its fund of information in these matters, largely upon the recorded experience in business and economic annals, when considering the soundness of activities under review. Therefore, for weighty testimony as to the value and effectiveness of statistical reporting, resort must be made to accounts of their actual operation. The application of a general rule, without relation to its practical setting, would scarcely overcome the danger of an imperfect conclusion.[20]

From this point of view, the desirable and legitimate scope of trade association statistical activity must be analyzed in terms of utility, adequacy, and efficiency. Statistics must thus be concrete, timely, precise, accurate, continuous,—not a "mere broth of general statistics"[21] nor a collection of "specimens for a mercantile museum."[22] Nor is the sole concern of the law a sterilization or fireproofing of statistical reports.[23] And it can be readily appreciated that the government is ill equipped, either by adequate appropriation or in flexibility of administration, to render to every private industrial enterprise, satisfactory or comprehensive service.

As the Department of Commerce states in its introductions to its Monthly Surveys of Current Business,

"Current statistics are highly perishable and to be of use they must reach the business man at the earliest possible moment."

They must disclose a complete picture of *current* business to be of advantage.

"By getting some figures here and some there and a smattering of opinions, some sort of idea of the situation might be developed, but it had to be rather hazy."[24]

However, the statistical service, under insistence of the law, must be no more than a guide for each individual member's intelligence and reason on questions of production and selling price.[25]

In considering the reported cases, it is perhaps most useful, in a general survey, to regard them all compositely. An enumeration of all the facts in the cases would extend this paper to undue length, and add but a doubtful profit.

"It is not enough to read a reported case for its facts. It must be analyzed for its controlling principles. Of course, the decided facts show an approved pattern which others may follow. But since no one of these cases can possibly include all the variations of needs and purposes which may be expressed in action, no one decision states all the law."[26]

In addition, close study of the opinions will disclose that the statement of fact, by the Courts, of the absence of a certain evidentiary feature, indicates solely that no such testimony appears in the record under review. It cannot be sweepingly asserted that the presence of such a fact would absolutely lead to a different conclusion. The relation of such testimony, as part of an unlawful agreement, is, in the last analysis, the most vital factor. It would therefore seem sufficient, in suggesting certain general rules for guidance, to point to the important features determining the validity or invalidity of the practices presented to the courts for adjudication, leaving the interested inquirer to pursue the investigation to the opinions of the courts or even to an examination of the transcripts of records and exhibits for the applicable law on some precise detail.

But before discussion some general rules, which already appear to have assumed definite shape, it should be observed that standardization and simplification aid materially in the development of a statistical plan. A variety in size, quality, shape, or workmanship, manifests itself necessarily in differences in cost and price. It must also be borne in mind that a specific reporting plan must, of necessity, be adapted to the nature and volume of each business.

In general, two types of reporting plans may be distinguished.

"The first is that employed in contract work, adapted to businesses in which it is customary to ask for and receive bids upon specific pieces of work, no two sets of specifications being alike."[27]

"The second type of reporting plan is that used in businesses in which goods are sold to jobbers and retailers and in which transactions are closed currently for quantities of goods which may be more or less closely graded and standardized. Great differences exist between associations with respect to the amount of detail and the frequency of reports by members to the central office."[28]

The most important consideration to bear constantly in mind is the fact that wherever a statistical reporting plan is merely the instrumentality or cloak for an agreement, or concerted action evidencing the wrongful purpose, to control prices or limit production, it is to be condemned in its entirety.

As stated by Justice Stone, in the Trenton Potteries case:[29]

"The decisions in Maple Flooring Mfrs. Asso. v. U. S. 268 U. S. 563, 69 L. ed. 1093, 45 Sup. Ct. Rep. 578, and in Cement Mfrs. Protective Asso. v. U. S., 268 U. S. 588, 69 L. ed. 1104, 45 Supr. Ct. Rep. 586, were made on the assumption that any agreement for price-fixing, if found, would have been illegal as a matter of law,"

and again in the Maple Flooring case, where the learned justice distinguishes the facts of that case from the facts in the Hardwood case:[30]

"The record disclosed a systematic effort, participated in by the members of the Association and led and directed by the secretary of the Association, to cut down production and increase prices. . . . The opinion of the court in that case rests squarely on the ground that there was a combination on the part of the members to secure concerted action in curtailment of production and increase of price, which actually resulted in a restraint of commerce, producing increase of price."[31]

Accordingly, it is of importance that in the Maple Flooring case, Justice Stone stated:

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the Sherman Anti-Trust Act (1926) 75 U. Pa. L. Rev. 122.

18. *Cf.* Podell and Kirah, The Problem of Trade Association Law, St. John's Law Review, Vol. 2, No. 1, December, 1927, page 3.

19. Adam Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations (10th edition, 1809), Book I, Chap. X, 200.

20. "The distinction between the direct or indirect effects of a combination is necessarily practical rather than ratiocinative. It is impossible to draw a line which shall be immune from casuistical attack, and perhaps it is unfortunate that the somewhat arbitrary and pragmatic nature of what courts do in such cases has been so frequently disguised by a show of deduction." Learned Hand, J., Live Poultry Dealers' Protective Association v. United States (C. C. A. 2nd) 4 Fed. (2nd) 840, 842.

21. Virgil Jordan, Stabilizing National Prosperity, Yale Review, October 1927, page 17.

22. Dr. Julius Klein, U. S. Daily, January 3, 1928.

23. *Cf.* Virgil Jordan, *supra* note 21.

24. Three Years' Progress in Current Business Statistics, Mortimer B. Lane, Bureau of Census, Journal of the American Statistical Association, New Series, Vol. XIX, December, 1924, page 508.

25. "Production must not be lessened nor prices raised except as they are done by the individual, guided by his own judgment and acting on his own initiative, after he has been given, in common with all others, including the public, full information of the essential elements of his business. This is simply a method of saying that the individual rate of production and the individual price are necessary elements of the individual freedom of trade." Nelson B. Gaskill; Legal Aspects of Statistical Activities, in Trade Association Activities, *supra* note 1, 45, 52.

26. *Ibid*, 54.

27. Tosdal, Open Price Associations, American Economic Review, Vol. 7, June, 1917, page 341.

28. *Ibid*, 346.

29. U. S. v. Trenton Potteries Co., et al., 71 L. ed. (Decided February 21, 1927) 404, 407. To the same effect is Federal Trade Commission v. Pacific States Paper Trade Association, 71 L. ed. (Decided January 3, 1927) 321.

30. *Supra* note 16.

31. *Supra*, note 3, 580.

"It is neither alleged nor proved that there was any agreement among the members of the Association either affecting production, fixing prices or for price maintenance."[32]

In strictest legal contemplation, the most liberal view which the Supreme Court has definitely announced is the exact holding in the Maple Flooring case.[33]

"We decide only that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, as did these defendants, and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce."

But in its practical effects, because of the paucity of case law on the subject, and also because of the new judicial point of view, the ruling cannot be contracted to such narrow limits.[34]

In the absence, therefore, of an agreement, or a concerted, wrongful course of conduct, such as discussed above, on the part of independent units, we can now enter into a consideration of certain specific practices, which have been considered crucial as tests of lawfulness or unlawfulness.

As noted above, an evaluation of the effect of the aggregate of all the facts of the particular plan under review, taken as a whole, rather than the presence of a certain evidentiary feature, is the proper method of approach. For this reason, the groupings which follow, can not be deemed absolute or final as measures of right or wrong, nor as an infallible index of the practices permitted and forbidden by the decided cases.[35]

1. Secrecy in reporting data, and the limitation of the information to the members of the association, have been regarded as one of the potent reasons for adjudging a reporting plan illegal. The reports must be made "openly,"[36] and not so as to "deal with widely separated and unorganized customers necessarily ignorant of the true conditions."[37] Buyers as well as sellers should be notified of market conditions, with adequate publicity to the buyers.[38]

The following statements from Supreme Court opinions, forcefully describe the vice of the situation:

"With intimate knowledge of the affairs of other producers and obligated as stated, but proclaiming themselves competitors, the subscribers went forth to deal with widely separated and unorganized customers necessarily ignorant of the true conditions."[39]

"In the presence of this record it is futile to argue that the purpose of the 'Plan' was simply to furnish those engaged in this industry, with widely scattered units, the equivalent of such information as is contained in the newspaper and government publications with respect to the market for commodities sold on boards of trade or stock exchanges. One distinguishing and sufficient difference is that the published reports go to both seller and buyer, but these reports go to the seller only."[40]

If buyers are not informed of the vital trade information collected and disseminated by federated sellers, the result must inevitably be to afford the sellers the advantage of making a charge for their commodities arbitrarily on the basis of all the traffic the market will bear rather than on production costs or real competitive values. From this narrow point of view statistical reporting tends to itself become an instrument of oppression, rather than one of advantage to buyers and consumers as well as sellers. It is furthermore economically necessary, in the interest of stability in market conditions, that information should be made available to buyers and sellers alike, all of whom are factors in market adjustment.[40A]

The publication of the statistics available to sellers should be reported to the Department of Commerce, trade journals, or some other neutral reporting medium. This added element of publicity would make statistical reporting tend to approximate, as near as practicable, the principle of the stock exchange or other open markets.

This feature was given great weight by the Court in the Maple Flooring case:[41]

"The statistics gathered by the defendant Association are given wide publicity. They are published in trade journals which are read by from 90 to 95 per cent of the persons who purchase the products of Association members. They are sent to the Department of Commerce which publishes a monthly survey of current business. They are forwarded to the Federal Reserve and other banks and are available to anyone at any time desiring to use them."

2. Again, statistics must be disseminated "fairly,"[42] and be a record of "actual" transactions.[43] False or fraudulent methods in the dissemination of statistics to the membership are unlawful. A restriction of reported sales only to the "best sales" renders the plan a convenient means to bolster up a declining market or assist in the maintenance of high prices. Such "salting" of statistical reports is merely a fraudulent manipulation of market prices, which could scarcely seriously commend itself to favorable judgment by the law.

As was stated in a case arising under a state antitrust statute:[44]

"Suffice it to say that the prices shown by Secretary Smith's compilation of the reports of his 63 correspondents were unfair; they are styled by the learned commissioner 'boosting' prices. If a great majority of the 63 reports showed no advance in the price of a given item, the price list would yet, almost without a single exception, show an increase in the price of this item."

3. The report must not give more detailed or specific information than is necessary to afford, to the other members of the industry, more specific information than is adequate for an intelligent knowledge of the fundamental conditions affecting the industry. The name of a customer or the specific facts of each sale does not ordinarily add to the general value of statistics. For this reason, the dissemination to the secretary and

32. *Supra* note 3, 567.

33. *Ibid*, p. 586. *Cf.* Correspondence between Secretary Hoover and Attorney General Daugherty, found in Jones' "Trade Association Activities and the Law," page 324 et seq.

34. *Cf.* Podell and Kirsh, The Problem of Trade Association Law, *supra* note 18, page 11.

35. "There is no distinct or specific list of what may not be done to which one may refer, except that the decisions of the courts contain statements of facts which have been condemned or approved. These are useful because they show what may not be done, but they are most useful in showing why certain things are prohibited. To get the value out of them as a guide to conduct, one must get acquainted with the idea which is expressed in the law and which the courts apply in the cases which come before them. This idea never reaches its final statement but is constantly developing as conditions in the business world change, and in changing produce new complications. But the same idea runs throughout, needing only some disinterested and impersonal thinking to project it upon some line of action on which no court has yet passed." Nelson B. Gaskill, *supra* note 25, p. 45.

36. Maple Flooring case, *supra* note 3, 586.

37. Linseed Oil case, *supra* note 16, 390.

38. *Cf.* Franklin D. Jones, Trade Statistics and Public Policy. Harvard Business Review, Vol. III (July 1925) 394.

39. McReynolds, J., in Linseed case, *supra* note 16, 389, 390.

40. Clarke, J. in Hardwood case, *supra* note 16, 411.

40A. *Cf. supra* note 1, p. 35.

41. *Supra* note 3, 573, 574.

42. *Ibid*, 586.

43. *Ibid.*

44. State ex Inf. Attorney General v. Arkansas Lumber Co. et al. (1914) 169 S. W. 145, 176. *Cf.* Milton Nels Nelson, Open Price Associations, Urbana, Illinois (1923) page 123.

the membership of copies of invoices of each transaction, exceeds the bounds required by an adequacy of information.

In addition,

"It has come to be widely recognized that the mere technical interpretation of the assembled and tabulated figures, and the discussion, at the association meetings, of general economic and trade conditions rather than specific production and price policies, are sufficient, without more, to facilitate the effective utilization of a genuine statistical service."[45]

In the American Column and Lumber case,[46] the report of each member to the secretary included "a *daily* report of all sales actually made, with the name and address of the purchaser."[47] Further, "these reports are to be exact copies of orders taken."[48] The secretary also sent each member "a *weekly* report . . . giving each sale and the price, and the name of the purchaser."[49]

The court emphatically drew the conclusion that

"Plainly, it would be very difficult to devise a more minute disclosure of everything connected with one's business than is here provided for by this 'Plan' and very certainly only the most attractive prospect could induce any man to make it to his rivals and competitors."[50]

Likewise, bearing in mind the particular facts in the Linseed case, it is enough to point out that Justice McReynolds cogently stated, in that case, that competitors "suddenly became parties to an agreement which took away their freedom of action by requiring each to reveal to all the *intimate details of its affairs*."[51] (Italics ours.)

It is of especial significance to observe, as did the Court, in the Maple Flooring case, that, after the decision in the Linseed case, not only were the names of purchasers withheld from the reports, but any identification of the mills which made these reports was likewise omitted.[52]

4. Comments, advice, or suggestions, by an official or representative of the trade association, dealing with the production or price policy of each individual member, seem to be regarded by the courts as a clear indication of group pressure, forcing the members to act in concert and in conformity with a joint plan. They establish the inference that all are obligated to act together "under the subtle direction of a single interpreter of their common purposes."[53] It is this point, also, which the Court has in mind in the Hardwood case when it objects to "significant suggestions as to both future prices and production"[54] on the part of the association. In like manner, we may refer to the finding by the Court in the Hardwood case of a "skilled interpreter of the published reports, such as we have in this case, to insistently recommend harmony of action likely to prove profitable in proportion as it is unitedly pursued."[55]

It should be noted that in the Maple Flooring case, the Court stated that association members were permitted to "meet and discuss"[56] the information. The Court gave, as its reason for so holding, that it found no agreement, attempt to agree, nor any concerted action, with respect to production, prices, or other unlawful practices.[57] The possible dangers resulting from judicial approval in this activity have been suggested by an able writer.[58]

A careful reading of the opinion will disclose that the ruling does not warrant, by its language, discussions of even past prices at these meetings:

"The testimony is explicit and not denied that, following the decision in United States v. American Linseed Oil Co. 262 U. S. 371 (June, 1923), *there was no discussion of prices in meetings. There was no occasion to discuss past prices,* as those were fully detailed in the statistical reports, and the Association was advised by counsel that future prices were not a proper subject of discussion. It was admitted by several witnesses, however, that, upon occasion, the trend of prices and future prices became the subject of discussion outside the meeting, among individual representatives of the defendants attending the meeting. *The government, however, does not charge, nor is it contended, that there was any understanding or agreement, either express or implied,* at the meetings or elsewhere, with respect to prices."[59] (Italics ours.)

It would seem, therefore, that the law, because of the strong possibility of formulating joint price policies at meetings, hesitated to permit the mutual discussion of past prices at such times.

5. The decisions draw a vital distinction between reports of the price of "past transactions," on the one hand, and "current" or "future" transactions, on the other. While the former have been adjudged permissible, in the ordinary case and in the absence of special circumstances the latter appear to be forbidden. As was stated by Justice Stone in the Maple Flooring case:

"All reports of sales and prices dealt exclusively with past and closed transactions."[60]

Thus, in the Linseed Oil case, Justice McReynolds, speaking for a unanimous court, held unlawful, among others, the following situation:

"Each subscriber agreed to furnish a schedule of prices and terms and agrees to adhere thereto—unless more onerous ones were obtained—until prepared to give immediate notice of departure therefrom for relay by the Bureau."[61]

As the Supreme Court said in the Maple Flooring case, in distinguishing the case before them from the Linseed Oil case:

"It was held that the agreement for price maintenance accompanied by free exchange of information between competitors as to *current prices* of the product offered for sale; full details as to purchasers, actual and prospective; and the exchange of information as to buyers and those to whom offerings were made by sellers and of the terms of such offerings, could necessarily have only one purpose and effect, namely, to restrain competition among sellers."[62] (Italics ours)

In the Hardwood case, the court stated:

"Members must file with the secretary at the beginning of each month price lists showing prices f. o. b. shipping point,"[63] and new prices had to be filed with the association as soon as made. The secretary then sent to each member not later than the 10th of each month, the summary of the price lists thus furnished by the members, showing the price asked by each, and any changes made therein were immediately transferred to all the members.

6. There must be no penal provision to compel each member, under duress of fine, suspension, or expulsion, to conform to group action rather than individual discretion. The member should not be penalized for exercising his own individual judgment as to the

45. Trade Associations: Their Economic Significance and Legal Status. National Industrial Conference Board, New York, (1925) page 121.
46. *Supra* note 16.
47. *Ibid* 394.
48. *Ibid* 395.
49. *Ibid* 396.
50. *Ibid* 395, 396.
51. Linseed case, *supra* note 16, 389.
52. *Supra* note 3, 573.
53. Hardwood case, *supra* note 16, 411.
54. *Ibid* 399.
55. *Ibid* 411.
56. Maple Flooring case, *supra* note 3, 586.
57. *Ibid.* So also, in the Cement case, the court points out that "There was no discussion at these meetings of current prices; no comment on conditions or as to prospect of market, production, or prices." *Supra* note 4, 601.
58. Franklin D. Jones, *supra* note 38.
59. *Supra* note 3, 575.
60. *Ibid* 573.
61. *Supra* note 16, 389.
62. *Supra* note 3, 582.
63. *Supra* note 16, 394.

limitation of his production or the price of his products, or the territory in which he will sell.

This use of penalties or forfeitures as a means of keeping the membership in line has been distinctly disapproved, especially in the Linseed case, where the court found that

"All subjected themselves to an autocratic Bureau, which became organizer and general manager, paid it large fees, and deposited funds to insure their obedience."[64]

This was referred to by Justice Stone in the Maple Flooring case as "heavy penalties for violation"[65] of the plan.

7. A drastic supervisory system which amounts, in substance, to an actual or potential control by the association of the individual's affairs, is another feature which has received judicial condemnation. When such an instrument is employed for the purpose of prying into the affairs of a member, to discover whether he has complied with a joint agreement of the membership, or operates as a constant threat of exposure, its use is forbidden. This is exemplified by the strict supervision illustrated in the Linseed case.

One of the most troublesome questions left open for adjudication is raised by the specific-job contracts of the Cement case. This is the only sanction of the law as it now stands, dealing with the reporting of each sale and listing the name of each customer, and the price for the future transaction, as found in the specific-job contracts dealt with in the Cement case.[66] An analysis of the Court's opinion with respect to this would seem to place these activities upon a special basis, and thus distinguish the particular situation there disclosed from the ordinary case.

The specific job contract was a form of contract, exclusively used by manufacturers of cement, whereby cement was sold for future delivery, for use in a specific piece of construction which was described in the contract. These contracts had become, by universal practice, optional, there being no obligation on the part of the purchaser to pay anything until after the delivery of the cement to him. The purchaser was not obligated to take the cement contracted for unless he chose to. He was not held to the price named in the contract in the event of a decline in the market, whereas the manufacturer was bound if there was an advance in price. This form of contract grew up to accommodate the contractors in bidding for future construction work, so that the required amount of cement would be available at a definitely ascertained maximum price. The Court pointed out that, in view of the option features of the contract, the contractor was involved in no business risk, if he entered into several specific job contracts with several manufacturers for the delivery of cement for a single specific job. Because of this peculiar arrangement, the contractor could compel each cement manufacturer to deliver the full amount of cement upon which he had an option, and divert it from the use of his specific job to other jobs. However, had the manufacturer known of this diversion, he could not have been required, under his contract, to make delivery, and quite likely would have chosen not to do so. Therefore the activities of the cement association were directed towards securing the information to remedy this situation and communicating it to the members, thus preventing contractors from securing future deliveries of cement, an experience which was common in a rising market.

Members reported to the secretary of the association:

1. All specific-job contracts, describing in detail the contract and giving the name and address of the purchaser.

2. The amount of cement required, the price, and delivery point.

3. The date of the expiration of the contract.

4. Detailed reports of all changes in the contract, including increases in the amount of cement to be delivered, and cancellations.

With respect to the legality of the specific-job contracts of the Association, the Court says at page 603:

"Unless the provisions in the contract are waived by the manufacturer, demand for and receipt of such deliveries by the contractor would be a fraud on the manufacturer; and in our view, the gathering and dissemination of information which will enable sellers to prevent the perpetration of fraud upon them, which information they are free to act upon or not as they choose, cannot be held to be an unlawful restraint upon commerce, even though in the ordinary course of business most sellers would act on the information and refuse to make deliveries for which they were not legally bound."

And as it says further at page 604:

"But for reasons stated more at length in our opinion in Maple Flooring Mfrs. Asso. v. United States, supra, we can not regard the procuring and dissemination of information which tends to prevent the procuring of fraudulent contracts, or to prevent the fraudulent securing of deliveries of merchandise on the pretense that the seller is bound to deliver it by his contract, as an unlawful restraint of trade, even though such information be gathered and disseminated by those who are engaged in the trade or business principally concerned."

It was argued, as the opinion in the Cement case indicates, that while there might be some justification for this particular practice as a remedy for the evil aimed at, nevertheless, since the price of the commodity generally could be determined if the price on specific jobs was disclosed, it could lend itself very easily to a price fixing plan, as the vehicle for the announcement of future prices. The reasoning of the Supreme Court thus answers this point.[67]

"It is contended by the government that the report of prices on specific-job contracts in effect informs the members of the Association of prices to dealers, since the differential allowed to dealers is well known in the trade. However this may be, the fact is that any change in quotations of price to dealers, promptly becomes well known in the trade through reports of salesmen, agents, and dealers of various manufacturers. It appears to be undisputed that there were frequent changes in price, and uniformity has resulted not from maintaining the price at fixed levels, but from the prompt meeting of changes in prices by competing sellers."

It would seem that the entire opinion leaves open a fertile field for special rules in those cases where bidding is the customary practice in the industry, and where false and misleading statements of other sellers' estimates are made by buyers in order to secure from sellers the most favorable terms.

Here, the flexibility of the rule of reason, which permits effective cooperative measures co-extensive with the evils sought to be cured, will necessarily have to be invoked as a measure of the legality of the practices presented to the court. In this class of cases, an enforcement policy cannot be too definitely stated in advance. Protective activities reasonably adapted to eliminate fraud are a legitimate zone for cooperative endeavor. If this condition seems to subvert the doctrine of the prohibition of the announcement of future prices, it can only be answered that here is an example of the unfolding of the policy of the anti-trust laws of

(*Continued on page 162*)

64. *Supra* note 16, 389.
65. *Supra* note 3, 581.
66. *Supra* note 4.
67. *Ibid* 605.

DEPARTMENT OF CURRENT LEGISLATION

Recent Legislation Relative to Business Insurance

By Sterling Pierson

A REVIEW of the legislation relating to "business insurance"[1] and the circumstances leading up to its enactment furnishes an interesting illustration of the way in which judicial decisions create obstacles to the economic development of the community which only the legislature can overcome and of the varieties of legislative contribution to the solution of such problems.

In recent years there has been an enormous increase in the amount of business insurance written by life insurance companies, this being accounted for by the fact that business concerns, which have always insured their physical properties against damage or loss, have come to realize that the economic loss involved in the death of an executive who plays an important part in directing the activities of an enterprise is no less real and may be far greater than any mere property loss. Acting upon this realization they have attempted to provide themselves with the necessary insurance, but have encountered difficulties in the form of the two well established common law rules of *ultra vires* and insurable interest. In order to meet the resulting need, the legislatures have attempted on the one hand to give to corporations authority to take such insurance, and on the other to protect the insurance companies against an illegal exercise by corporations of the power thus granted.

Victor v. Louise Cotton Mills,[2] decided by the Supreme Court of North Carolina, was one of the earliest cases in which it appeared that the common law doctrines as applied by the court were not keeping pace with the economic development. The plaintiff in that case sued the defendant corporation of which he was a stockholder to enjoin the payment of further premiums on two policies of insurance for $50,000 each upon the life of a person who at the time the policies were taken was the president of the corporation, but had ceased to be connected with the corporation before the suit was brought. His contention was based upon the ground that the injunction should be granted because the payment of further premiums involved an improper use of corporate funds and because the corporation had no insurable interest in the insured's life. The Supreme Court, in holding that the trial court had properly granted an injunction, avoided the question of insurable interest and placed its decision upon the ground that the corporation had neither express nor implied authority to expend its funds for the payment of premiums for policies on the life of an officer. The reasons expressed in the court's opinion for reaching this conclusion were interesting. Although conceding that corporations might have implied authority to pay premiums on policies insuring physical property against destruction, such authority being "based upon the power and duty of the directors to resort to the usual methods to protect and indemnify the company against such accidents", the court said that the insurance of the lives of officers or employees of corporations did not come within the principle of implied or incidental powers. Not only was the court of the opinion that no authority then existed for effecting such insurance, but it also suggested, probably realizing that an appeal might be made to the legislature, that it would be dangerous to grant such power to corporations because of the temptation which would thereby be created to depart from safe methods of corporate financing and to launch into speculation and because corporations might also be tempted to acquire an interest in and ultimate control of the insurance company issuing the insurance and the investment of its surplus. Although the fact that the insured was no longer in the service of the corporation was stressed by the court, this apparently was not the controlling factor in the decision, for the same conclusion was reached in another case[3] decided at the same term, although it there appeared that the insured was still president of the defendant corporation.

The courts of North Carolina might in time, if presented with proof of a custom among corporations to insure the lives of their officers, have reached a different conclusion, but with such a decision as that in the *Victor* case confronting them it would be unlikely that a number of corporations sufficient to create a custom would adopt this practice. Resort was therefore immediately had to the legislature of North Carolina, which apparently had a greater regard than the court for the wisdom and integrity of directors of corporations, as it enacted a statute[4] to the effect that:

> "Whenever there shall devolve upon an officer or agent of a corporation duties and responsibilities of such a nature as that a financial loss would result to the corporation from the death and consequent loss of the services of such officer or agent, then in such cases the corporation shall be deemed to have an insurable interest in the life of such officer or agent and shall have the power to insure the life of such officer or agent for its benefit."

A Circuit Court of Ohio held, in a case[5] relating to policies on the lives of five directors of a corporation, that "the company had no insurable interest in its directors, and if it did that the secretary and manager (who had entered into the contracts without express authority) were unauthorized to enter into the contract without the assent of the board of directors." The Supreme Court of Ohio made unnecessary the legislation which might otherwise have resulted from this decision by deciding[6] that a corporation had an insurable in-

1. The term "business insurance" is usually applied to insurance taken out and paid for by corporations upon the lives of their directors, officers and employees, and to insurance taken by members of a partnership upon one another's lives. This note deals only with the first type of business insurance.

2. (Sup. Ct. North Carolina 1908) 61 S. E. 648.

3. Victor v. Manufacturing Co. (Sup. Ct. North Carolina 1908) 61 S. E. 653.

4. North Carolina Laws of 1909, Chapter 507.

5. Insurance Co. v. Schott (Cir. Ct. 1908) 30 Ohio C. C. Rep. 656.

6. Keckley v. Coshocton Glass Co. (Sup. Ct. Ohio) 99 N. E. 299.

terest in the life of an employee largely relied upon to make its business a success and that the corporation could recover the proceeds of a policy taken upon the life of such a person even though he was not in its employment at the time of death.

In 1911 Pennsylvania enacted a statute[7] authorizing a firm or corporation to "take insurance upon its members and its officers and directors, and upon its employees, and for pension purposes and relief purposes", and two years later Wisconsin[8] granted to corporations power "To cause to be insured for its benefit the life of any director, officer, or agent thereof, and to pay premiums therefor." The Wisconsin legislature also made an attempt to solve the problem raised in the first *Victor* case as to the propriety of using corporate funds for the payment of premiums for insurance upon the lives of persons who had ceased to serve it by providing that "Whenever any such director, officer, or agent shall cease to be a director, officer, or agent, such corporation shall cease to pay such premiums, unless agreed to by a vote of stockholders holding at least 80 per cent. of the shares of stock of such corporation." It will be noted that these statutes were silent on the question of insurable interest.

The year following the enactment of the Wisconsin statute it was held by the Supreme Court of Virginia[9] that it was not an *ultra vires* act for a corporation to insure the life of an individual who was its president and general manager, and that it had an insurable interest in such a person's life, as "His relation to and knowledge of the financial and manufacturing interests of the plaintiff was such that his death could not fail to result in serious and substantial loss to its creditors and all others interested in its property." A similar conclusion was reached in Tennessee in a case[10] in which it appeared that the insured, who had been the corporation's general manager, had left its service prior to his death.

The development of business insurance was impeded not only by judicial decisions but also by the action of administrative officers, for the Comptroller of Currency ruled that the tenure of office of an official of a national bank "is too ephemeral to create an insurable interest in the bank," and that "Even if the interest is an insurable one, I am inclined to the view that the directors whose duty it is to dismiss an officer when in their judgment the interests of the bank so require, would not have power to expend the funds of the bank in insuring his life, either continuously or for a definite term." Many attempts were made by company counsel to obtain a modification of this ruling, and for seven years their efforts were unavailing, but under date of October 13, 1927, the Comptroller issued a new ruling in which he stated that his office would no longer offer objection to a proposal by a national bank to insure the lives of any of its officers in whom it had an insurable interest. This indicates that the administrative officer or body is less likely to be bound by the decisions of the past than a court and is therefore a valuable tool in making the adjustments necessary to meet changed economic conditions. The power to pass upon the extent of the insurable interest he reserved to himself, but stated that where an application was to be approved it must appear not only that the relationship of employer and employee existed, but also that "the corporation securing the policy has a real concern in the life of the party named, whose death would be the cause of a substantial loss to the business, and this does not follow ordinary services, but arises where the success of the business is dependent upon the continued life of the party named." This is an unusually strict measure of insurable interest.[11]

In 1923 there appeared in Indiana[12] a new form of statute which represented the beginning of a systematic attempt to provide a legislative cure for the difficulties which had arisen. This statute provided that any corporation, when authorized by its board of directors or its executive committee, might "cause to be insured, for its benefit, the life of any of its directors, officers, agents or employees, and to pay the premiums for such insurance; and may continue to pay such premiums after the insured shall cease to be such a director, officer, agent or employee of such corporation." It further provided that

> "Due authority for such corporation to effect, assign, release, convert, surrender, or take any other action with reference to such insurance, shall be sufficiently evidenced to the insurance company by a certificate to that effect by the secretary, or other corresponding officer of such corporation, under its corporate seal. Any such certificate shall protect the insurance company for any act done or suffered by it upon the faith thereof, without further inquiry into the validity of the corporate authority or the regularity of the corporate proceedings. The beneficiary in such a policy shall not be changed except with the consent of such corporation, beneficiary, effecting such insurance."

Although this law was intended by its sponsors to benefit insurance companies writing business insurance, it did not entirely serve this purpose, as the ambiguity of the language used by its draftsman created doubt as to what kinds of business insurance could be written and as to what evidence could be relied upon as to due corporate action having been taken by corporations applying for such insurance.

While it authorized corporations to cause to be insured the lives of certain classes of individuals, it was not entirely clear that the power extended to cases in which the corporation could not show a definite pecuniary interest in the person upon whose life the insurance was taken.[13] Then, too, it required the assent of the board of directors or executive committee of the corporation applying for the insurance, although many of the life insurance companies had assumed that the formality of obtaining board consent to an application for life insurance was unnecessary, and that the executive officers could enter into contracts of life insurance just as freely as any other contracts incident to the proper conduct of a corporation's business. The companies writing group insurance were troubled by the fact that the statute limited the authority of a corporation to cause the lives of its directors, officers, agents or employees to be insured to cases where it appeared that the insurance was "for its benefit." They feared that this language of the Indiana law might be construed as forbidding the writing of group insurance, inasmuch as most of the group insurance statutes provide that such insurance shall be "for the benefit of persons other than the employer."[14] This provision also made it doubtful whether corporations could use endowment

7. Pennsylvania Laws of 1911, P. L. No. 226.
8. Wisconsin Laws of 1913, Chapter 188.
9. Mutual Life Insurance Company v. Board, Armstrong & Co. (Sup. Ct. Virginia 1914) 80 S. E. 565.
10. Wurzburg v. N. Y. Life Ins. Co. (Sup. Ct. Tennessee 1918) 203 S. W. 332.
11. Cf. Fletcher, "Cyclopedia of Corporations" Vol. 2, Sec. 836 and one of the most recent decisions of the Supreme Court of the United States on this subject, U. S. v. Supplee-Biddle Co. (1924) 265 U. S. 189. Also see the statute of 1774, 14 George III, c. 48.
12. Indiana Laws of 1923, Chapter 156.
13. One of the cases which seemed to justify doubt in this respect was that of United Security Life Ins. & Trust Co. v. Brown (Sup. Ct. Pennsylvania 1921) 113 Atl. 446.
14. See New York Insurance Law, Section 101-a.

policies as a substitute for pensions. On the other hand, the provision that the beneficiary in a business insurance policy should not be changed "except with the consent of such corporation, beneficiary, effecting such insurance" seemed to imply that a corporation might consent to the naming as beneficiary of a person other than itself and to this extent to be in conflict with that portion of the statute authorizing a corporation to take business insurance "for its benefit." There was also considerable difference of opinion as to the construction of the provision of the statute prescribing the kind of evidence which could be relied upon as to the existence of due authority for the action taken by the corporation. Counsel for some of the insurance companies were of the opinion that the form of certificate provided for in the statute *might* be relied upon but that other evidence could be accepted, while others were inclined to the view that the effect of the statute was to make that the only evidence which could be relied upon. Because of this confusion it was felt by some that it would be unwise to have similar laws enacted in other states. Notwithstanding this fact, however, the same law was passed in 1926 in Virginia,[15] where the courts had already passed upon most of the questions dealt with in this statute, reaching conclusions favorable to the corporations and the insurance companies.

In 1927 the Indiana statute in modified form, having been introducd in twenty-one legislatures, was enacted into law in nine states.[16] These statutes did not continue the provision expressly granting authority to corporations to take business insurance, but simply prescribed the type of evidence which might be relied upon as to the existence of due authority "to effect, assign, release, convert, surrender, or take any other action with reference to such insurance." They further provided that an insurance company relying upon the prescribed form of evidence should be protected "for any act done or suffered by it upon the faith thereof, without further inquiry into the validity of the corporate authority or the regularity of the corporate proceedings."[17] Unfortunately for the insurance companies the legislators were not in agreement as to the form of the evidence. In Arkansas, Idaho, Nebraska and Tennessee the companies may rely upon a statement signed by the president *or* secretary or other corresponding officer under the corporate seal. In Montana, New Mexico and North Dakota reliance may be placed upon a statement signed by the president *and* secretary or other corresponding officer under the corporate seal. In Oregon the evidence provided for by the statute is a written statement under oath, signed by the president and secretary and under the corporate seal, showing that the action taken has been approved by a majority of the board of directors, while in South Dakota the statement must be signed by the President and Vice President and the Secretary and Treasurer or other corresponding officer of the corporation under its corporate seal.

The diversity of these requirements has created an added burden for the insurance companies instead of the benefit which was intended. The apparent purpose of the draftsman of these provisions is to create an estoppel in favor of life insurance companies relying upon written representations made by corporate applicants for insurance. It is rather difficult to understand why transactions between a corporation and a life insurance company should be governed by rules of estoppel different from those applied to similar transactions between a corporation and any other kind of insurance company or another corporation, nor is it clear that the life insurance companies have suffered under the existing rules of law. The case which has been cited so often as illustrating the perils to which life companies are subject in the absence of special statutory protection is that of *Coleman v. Northwestern Mutual Life Insurance Company*,[18] but that case has seemed to many to have been decided upon a question of pleading and not of substantive law. This conclusion seems to be borne out by the statement in the court's opinion that "Neither estoppel nor laches, relied upon as estoppel, is pleaded. In this case neither could be relied upon without being pleaded."

Legislation has helped to eliminate some of the uncertainty which existed as to the power of corporations to insure the lives of their officers and employees, but some of the problems which have arisen from the common law requirement of an insurable interest remain unsettled. The conflicting decisions and administrative rulings make it doubtful whether the existence of the relationship of employer and employee *per se* establishes an insurable interest, or whether a corporation has an insurable interest in the life of an officer or employee only where it clearly appears that it would suffer a substantial pecuniary loss by reason of the officer's or employee's death. These are questions which cannot be answered satisfactorily without further judicial decisions and where these are unsatisfactory further appeals for help will have to be made to the legislatures.

15. Virginia Laws of 1926, H. B. No. 150.

16. Arkansas, H. B. 248; Idaho, Chapter 27; Montana, Chapter 21; Nebraska, H. B. 227; New Mexico, H. B. 29; North Dakota, S. B. 119; Oregon, Chapter 257; South Dakota, H. B. 230; Tennessee, Chapter 55.

17. These statutes contained one other provision, interesting from the point of view of general corporate procedure, to the effect that "No person shall be disqualified, by reason of interest in the subject matter, from acting as a director or as a member of the Executive Committee of such corporation on any corporate act touching such insurance."

18. (Sup. Ct. Missouri 1917) 201 S. W. 544. In that case an action was brought by the trustee in bankruptcy of the George D. Allen Paper Company to recover the proceeds of insurance under a policy procured by that company upon the life of its president, and the case came before the Supreme Court of Missouri on appeal from an order overruling a motion to set aside a nonsuit. At the time the policy was issued the corporation was named as beneficiary and no right was reserved to change the beneficiary. Later the insurance company received an instrument signed by the corporation's president and secretary and bearing its corporate seal requesting that the policy be made payable to the president's wife. The original policy was surrendered with this request and a new policy was issued and at the death of the president the insurance company paid the proceeds to the beneficiary named in the new policy. It was contended by the trustee in bankruptcy that the change of beneficiary was improperly made since the Board of Directors had never approved the request for change. The Supreme Court reversed the judgment and remanded the case for further proceedings.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR, MANAGER
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THE WIDENING CONTACTS OF THE PROFESSION

One of the most striking and significant phenomena of the day, at least to the lawyer, is the widening contacts of the profession. In many directions it is touching the major interests of our common life to an extent never before attained among us. Heretofore as a rule the contacts of the profession were those of the individual lawyer acting for his clients or playing a role in the wider field of politics or statesmanship, with his professional character and point of view pretty much in the background. Today these of course continue, but they have been supplemented by what is really a fairly recent development, viz: the contact of the profession itself, acting through its principal organizations, with many broader problems of our country.

When accredited representatives of the American Bar Association meet with representatives of employers and labor in order to try to work out a means of furthering the peaceful settlement of industrial disputes, as was recently done, it is plain we have something different from the relation of lawyer and client, lawyer-statesman and the public constituency, or of a mere group of individual lawyers moved by a sense of public duty to confer with others on a national problem of great importance. We have a responsible profession acting through its representatives as adviser and cooperator with two great economic groups—with groups so important, in fact, that they would hardly be inclined to defer, in concerns like those under discussion, to the individual opinions of lawyers, no matter how distinguished they might be in professional life. In brief, we have a form of contact of real significance and one which would have been impossible in the days when the Bar was practically unorganized and without anything approaching an authoritative voice.

Again, when the Secretary of the Interior comes to an annual meeting of the American Bar Association and asks the aid of the profession in finding a solution for the acute problem presented by the great and increasing waste of our national resources in oil, under pressure of unlimited and spendthrift competition, we have something different from a mere request for legal advice. We have an appeal to a great profession and a great organization for the exercise of the highest qualities of legal statesmanship. And when the representatives of the American Bar Association were appointed to serve on the joint committee which he proposed, the act illustrated clearly the widening range of usefulness of the profession in matters of national concern.

Illustrations of these widening contacts abound. There is the rapprochement with the medical profession, with a view to reaching conclusions with regard to problems of the criminal law which are becoming more and more acute. The American Association of Psychiatrists and the American Bar Association are working along similar lines. In the various Crime Commissions, State and National, which have been created in recent years, the profession and important groups of lay representatives are joining hands for the attainment of common ends. In the matter of judicial selection the profession is establishing contacts with the lay electorates on a truly large scale—and the electorates are coming to pay increasing attention to what it has to recommend. By means of Judicial Councils in various states it is coming more and more into touch with legislatures and also with public opinion as a whole.

The plan of Judge Finch approved by the Judicial Section of the Association at the Buffalo meeting represents a proposed contact with the business world, not for the purpose of aiding some other organization or group to solve its problems, but in order to secure assistance in solving what are to a great extent the special problems of the profession itself. That proposal, it will be re-

called, was that the Executive Committee consider the feasibility of asking leading lay organizations, like the National Chamber of Commerce, the National Industrial Board, the American Bankers' Association and others, to appoint representatives to meet with representatives of the Association to survey the methods and results of legal procedure and to "report whether the growth of the administration of justice has been commensurate with the rapid advance of business, and if not, to recommend a program through which a better adjustment may be accomplished."

The list of such actual or proposed contacts might be extended greatly, but it is unnecessary. The remaining point of importance is that all this has come about as a result of the organization of the profession. The more inclusive and coherent that organization is, the wider will be the contacts of the profession with the various phases of our national life. There is something definite and responsible about an organization. It is in a position not only to speak but also to help. "Whom do you represent?" is a question that is sure to be asked at some stage of any discussion of important matters. The representatives of the Bar Associations can give a prompt and satisfactory answer that inspires confidence and admits responsibility.

THE PARAMOUNT PROBLEM

The Administration of Justice was placed first in the list of paramount problems of the United States by the vote of the members of the National Economic League taken in January of this year. Then came Lawlessness and Disrespect for Law, Prohibition, Flood Control, Prevention of War, Agriculture and Farm Relief, in the order named. Far down in the list of fifty were the paramount problems of other days. Trusts and Monopolies, which once filled the land with sound and fury, received only 128 votes as against 1720 for the Administration of Justice. Railways would seem to have ceased to be a problem, to judge from the vote of 170 in favor of their paramount importance today. The tariff no longer occupies a foremost place in the opinion of those consulted, the vote being only 505, and that, too, in a presidential year.

Almost anyone going down the list would possibly find something to criticise in the relative importance ascribed to the various problems by the preferential vote of the League. But the result of the vote is of value because of the character of the membership of the organization. It represents the views of a select and intelligent constituency and not merely the emotional reactions of a miscellaneous group. The prime interest for lawyers lies of course in the striking affirmation as to the supreme importance of the problem of securing a proper administration of Justice in the nation.

Lawyers should welcome this because it shows that intelligent public opinion is waking up to the situation and is thus furnishing one essential element of progress and improvement. Until intelligent public opinion is strong enough to support proper measures of advance, progress will necessarily be slow. When the thinking section of the public realizes the importance of the problem, legislative indifference, for one thing, will not be so marked in matters of law improvement as it is at present in many quarters. The administration of justice is a problem of public opinion and not a mere matter for the Bench and Bar to look after.

INFORMATION AT THE SOURCE

Plans for establishing better educational standards, both literary and legal, for the applicant for admission to the Bar represent an effort to attack the problem of ill-educated and ill-disciplined members of the profession at what is generally regarded as the source. But there is a point even back of this at which it may be attacked and doubtless with good results. This is suggested by a pamphlet entitled "Facts for the Prospective Student of Law," issued by H. E. Stone, Dean of Men of West Virginia University, and revised by Dean Roscoe Pound and Dean John H. Wigmore.

The pamphlet, as its name suggests, attempts to give the young man contemplating the study of law a fairly good idea of what the profession means, the hardships which success in it demands, the rewards which success carries, the educational requirements which are now deemed necessary, and the spirit that should actuate the profession as a whole. A number of good books are suggested as suitable for reading by the young man who contemplates taking up the study of law. This form of vocational guidance should prove very useful and help to aid young men in getting a better idea of the profession which many of them are inclined to choose without due consideration.

REVIEW OF RECENT SUPREME COURT DECISIONS

Equity Rule 75b and Proper Course Under Certain Circumstances Indicated — Federal Jurisdiction to Enjoin in State Taxation Matter—New Cause of Action Under Illinois Statutes—Power of Appellate Court to Issue Mandamus—Section 6 of Chinese Exclusion Act Construed—Repossession of Chattel Under Conditional Sale Within Four Months of Bankruptcy of Seller Held Not Illegal Preference —Liability to Third Parties for Injury to Property

By Edgar Bronson Tolman*

IN our review of Blodgett v. Holden, page 35 of the January issue, we said: "In an opinion delivered by Mr. Justice McReynolds the Supreme Court answered affirmatively the question certified to it and held that as to the gift made in January 1924 the statute was invalid."

The opinion written by Mr. Justice McReynolds contained this statement: "As to the gift which Blodgett made during January 1924 we think the challenged enactment is arbitrary." The concurring opinion by Mr. Justice Holmes, referring to the duty which the court has imposed upon itself not to declare an act of Congress unconstitutional if any other course is possible, declines to hold the act under consideration unconstitutional, but holds that it should be interpreted as having a prospective effect only and therefore inapplicable to gifts made prior to the date of its passage. The record did not then show that Mr. Justice Sutherland was absent, and it was accordingly assumed that all the Justices who did not concur in the opinion of Mr. Justice Holmes, did concur in the opinion of Mr. Justice McReynolds. The court has now removed all possibility of misapprehension by the entry on February 20 of the following amendatory order:

"By the Court: An equal division of opinion among the eight Justices who heard and considered this matter renders it impossible categorically to answer certified question No. 2. The other two questions, we think, are not essential. The statements of views by the Justices are enough to show that the tax exacted of Blodgett cannot be sustained under sections 319-324 of the revenue act of 1924, and they will enable the Circuit Court of Appeals readily to reach a proper decision. The cause will be remanded there for appropriate action.

"The opinion of Mr. Justice McReynolds is amended by striking out the words 'And the question is so answered,' and by adding thereto 'The Chief Justice, Mr. Justice Van Devanter, and Mr. Justice Butler concur in this opinion.'

"The opinion of Mr. Justice Holmes is concurred in by Mr. Justice Brandeis, Mr. Justice Sanford and Mr. Justice Stone."

In our review of the Murray and Cook cases, pp. 95 and 96 of the February number, our head note read as follows:

"Under the Probation Act the District Courts have the power to suspend sentence and place a defendant on probation after conviction, plea of guilty or nolo contendere any time until the imposition of sentence but not thereafter."

Assistant Attorney General Mrs. Mabel Walker Willebrandt calls our attention to an error in the use of the words "until the imposition of sentence." She correctly points out that the question certified to the Supreme Court was as to the existence of a right to parole a defendant "after he had begun to serve sentence," that is to say, after execution of sentence had begun. We confess to a failure to take into account that there may be an interval between the *imposition* of a sentence and the beginning of its execution.

The headnote on page 95 should be amended by striking out the words "until the imposition of sentence" and inserting the words "before he begins to serve sentence." A similar correction should be noted in the first paragraph on page 96 after the quotation.

The Journal acknowledges its indebtedness to Mrs. Willebrandt for her valued suggestions and takes great pleasure in correcting the error at the earliest opportunity.

Practice on Appeal—Certificates of Evidence—Testimony in Narrative Form—Allowances of Counsel Fees as Costs

On appeal in equity cases from a district court to a Circuit Court of Appeals the requirements of Equity Rule 75b that the evidence be stated in simple and condensed form and that testimony be in narrative form must be complied with. A district judge may not properly direct that all testimony be stated in the exact words of witnesses even though the rule permits parts thereof to be so stated in the discretion of the judge. But sound discretion must be exercised by the Court of Appeals in its disposition of the case for non-compliance with the rule. Affirmance is too severe a penalty particularly where the court had theretofore been uniformly indulgent of such a course. Opportunity for compliance with the rule should be afforded, on payment of costs including counsel fees.

Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., Adv. Op. 182 Sup. Ct. Rep., Vol. 48, p. 183.

This suit was brought early in 1915 to obtain an injunction against the infringement of a patent and to recover profits made through such infringement. The plaintiff's title, the validity of the patent, and the infringement were put in issue. After a hearing an in-

*Assisted by Mr. James L. Homire.

terlocutory decree was entered in favor of the plaintiff and the cause referred to a master to ascertain the profits. The reference directed the master to take evidence and report his findings together with all the evidence. No appeal was taken from the interlocutory decree since no injunction was granted and none could have been granted inasmuch as the patent had expired before that decree.

The interlocutory decree was rendered by Judge Humphrey but after his death in 1918 all subsequent proceedings were had before Judge FitzHenry. In January, 1921, the master filed his report finding that the defendant's profits from the infringement were $650,044.83 and recommending a recovery of that sum by the plaintiff.

With his report the master turned in the evidence taken but did not so state in his report, nor did he attach any certificate to the evidence. In receiving the evidence the clerk omitted to put a filing indorsement thereon.

Both parties took exceptions to the master's report but after a hearing on the exceptions the court confirmed the report on April 30, 1924, and awarded to the plaintiff the sum fixed by the master with interest and costs. In a memorandum opinion the court indicated that the evidence taken by the master was before it and was examined.

In July, 1924, an appeal was allowed the defendant to the Circuit Court of Appeals where both decrees were challenged as unsupported by and contrary to the evidence. By various orders at the appellant's request the time for filing the transcript of the record was extended a year during which the appellant prepared, printed, and lodged with the clerk a proposed transcript for certification. This contained about 5,000 pages in 9 volumes and was without the approval or authentication of court or judge and without noticeable condensation or reduction to narrative form, except as reduced by the omission of some exhibits.

In April, 1925, the appellant lodged the proposed transcript with the clerk, served a copy on the appellee and afterwards served a praecipe designating printed pages 24 to 1215 inclusive as the evidence to be included in the transcript in support of the interlocutory decree and other pages as containing the evidence taken by the master. The appellee made no objection and in June, 1925, the clerk attached his certificate to the proposed transcript. In July, 1925, this transcript was filed in the Circuit Court of Appeals, but without the requisite copies which were not filed until four months later.

When the case came on for argument the appellant requested a division of the case so that first the questions relating to the interlocutory decree could be determined and if that should be sustained, then a hearing had on other questions. The appellee objected to this and suggested, first, that all the evidence in the transcript be stricken because not in simple and condensed form and because the testimony of witnesses was not in narrative form as required by Equity Rule 75b, and second, that the evidence before the interlocutory decree be stricken for the reason that it had not been authenticated by court or judge as required by rule.

The court denied the request to divide the argument and then in January, 1926, although retaining jurisdiction of the appeal, remitted the transcript to the district court so that the district judge could amend the certificate of evidence and make such correction, amendment, or amplification as he saw fit. The district court added a supplemental transcript including certain omitted exhibits and at the request of the appellant directed all testimony of witnesses to be reported exactly in their words and not in narrative form. The transcript was returned to the Court of Appeals with the additional transcript as volume ten and the district judge's statement that pages 24 to 4872 were a true statement of the evidence.

At the hearing the appellee renewed its prior suggestion and further urged that the situation had not been changed by the later proceedings in the district court because that court was then without power to act or if it had power it had not acted according to Equity Rule 75b. The Court of Appeals held that the evidence had not been prepared as required by the rule, refused to examine it, and affirmed the decree of the trial court. The appellant then sought a rehearing upon the ground that under the circumstances the exercise of a sound discretion required that the transcript be remitted to the district court for proper compliance with the rule. The rehearing being denied, certiorari was granted by the Supreme Court of the United States.

That Court, in an opinion by MR. JUSTICE VAN DEVANTER, entered into a full consideration of the points involved in the case and held that under all the circumstances the decree should not have been affirmed, but that opportunity should have been allowed to prepare the record properly. As a condition for this opportunity however, the Court required the payment of $5,000 and costs by the appellant for the benefit of the appellee as reimbursement for counsel fees and expenses incurred in eliminating the objectionable condition of the transcript.

The opinion designated the parties as they were in the Court of Appeals. The point first disposed of was that since the Equity Rules rest on statutes conferring power on the Supreme Court to regulate equity practice in the district courts, they had no application to this case because it was in the Court of Appeals. With reference to this point the learned Justice said:

> It is true that the Equity Rules are based largely on statutes which authorize this Court to regulate the practice in suits in equity in "the district courts." But plainly rule 75b is within that authorization. It prescribes the form and manner in which the evidence in suits in equity in those courts may be made a part of the record therein. The prior practice had varied and experience had shown there was need for uniformity and simplicity. The rule was adopted to meet that need. That it is intended, like the prior practice, to pave the way for an appellate review extending to the evidence does not make it any the less a regulation of proceedings which are had in the district courts. Its status, therefore, is not different from that of rule 71, which requires that decrees be put in direct and simple form and be free from any recital of the pleadings, evidence, etc.

The second contention discussed was that of appellant to the effect that the rule was complied with because the district court ordered the testimony to be prepared in the form in which it was presented and that this was allowed by Rule 75b. The validity of this contention was denied with the following comment:

> It proceeds on the erroneous assumption that, where either party so requests, the court may dispense entirely with the condensation and narration of the testimony of witnesses and direct that it be stated in full in their words. The rule says that the evidence "shall not be set forth in full" but shall be stated "in simple and condensed form," that all that is not essential shall be omitted, and that the testimony of witnesses shall be stated "only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness." Manifestly the

excepting clause is intended to have only a limited operation and to be applied in the course of the required condensation and narration, as special occasion therefor arises. Its purpose is to provide for the exact reproduction of such parts of the testimony as need to be examined in that form to be rightly appreciated. As to other parts of the evidence it neither qualifies nor relaxes the direction for condensation and narration.

The transcript shows that in fact no part of the evidence was condensed or put in narrative form, and also that as to nearly all of the testimony there was no occasion for reproducing it in the words of the witnesses. Had the rule been complied with the evidence would have been reduced in volume two-thirds or more; and had this work been done at the outset the charge for printing would have been proportionately less—probably more than enough to offset the cost of compliance. One object of the rule is to eliminate immaterial and redundant matter and to effect such a condensation and statement of what remains as will simplify and facilitate the task of counsel in presenting, and of the court in determining, questions turning on the evidence. Here the requirement looking to the attainment of that object was wholly neglected.

The appellant invokes the statute which directs that technical errors and defects not affecting the substantial rights of the parties be disregarded. But the error here is not merely abstract or formal. It consists of a total failure to observe an important regulation in a matter of substance. Nor is it harmless. It makes the case difficult of presentation by counsel and materially augments the task of examination and decision by the court. Repetition of it in other cases would soon congest the dockets of the appellate courts. To condone such an error is not, we think, within the purpose of the statute.

Next in order certain technical matters were disposed of. The first of these was that during the pendency of the appeal the district court had no jurisdiction over the case. The pertinence of this was denied and it was pointed out that action as suggested would be in aid of the appellate court's jurisdiction rather than an infringement on it. The second matter was that the district court had no jurisdiction, since its term had expired without extension. This point was rejected with the statement that action under the rule was not confined to the term or to a period allowed during the term. The third of these matters was that by reason of the death of Judge Humphrey, the failure of the master to attach a certificate, and the omission of the clerk to place a filing certificate on the evidence, the favored and usual methods of identifying it were not available. But the Court thought that it was sufficiently shown that other adequate means of identifying the evidence were available, and so disposed of this point also.

In conclusion, the learned Justice elaborated the reasons for holding that under the circumstances further opportunity should have been allowed to condense the evidence, saying:

> We come then to the circumstances bearing on the question of discretion. The rule was promulgated in 1912. The requirement respecting condensation and narration was not drawn from the earlier practice but was new. Its enforcement was slowly approached. For a time transgression was indulgently overlooked. Then this Court and some of the Circuit Courts of Appeals, having called special attention to the requirement, began to give effect to it. The Court of Appeals for the Seventh Circuit continued to be uniformly indulgent until it came to decide this case. There may have been some scolding before, but not in the court's opinions. It was a common practice in that circuit for the judges, circuit as well as district, to direct that all the testimony be reproduced in the words of the witnesses. In so directing in this case the district court followed that practice. Of course the practice was in contravention of the equity rule and the Court of Appeals was right in giving effect to the rule by declining to examine the mass of evidence wrongly produced. But the court did not stop there. It also affirmed the decree because of the transgression—and this notwithstanding the transgression was largely due to its own course of action. That was a very severe penalty to impose for action which had the court's implied sanction up to that time. The fact is not overlooked that after the original transcript was filed the appellee called attention to the requirement for condensation and narration and asked that the rule be given effect. But regard also is had for the fact that when the transcript was remitted the district court directed the reproduction of the testimony without condensation or narration.
>
> When the particular situation in the Seventh Circuit is considered, we think it is apparent that the Court of Appeals passed the bounds of a sound discretion in affirming the decree, because of the transgression, and that, upon proper terms, it should have remitted the transcript to the district court to the end that a further opportunity might be had to comply with the equity rule. Such a remission should still be made, care being taken to require that the proceedings under the rule be conducted with reasonable dispatch.
>
> As the rule places the duty of condensing and narrating the evidence primarily on the appellant, and most of the proceedings since the appeal have been attributable to the failure to discharge that duty, the appellant should be required, as one of the terms of the remission, to pay into the Court of Appeals five thousand dollars for the benefit of the appellee by way of reimbursing it for counsel fees and expenses incurred in securing the elimination of the irregular and objectionable statement of the evidence; and also to pay, as one of such terms, the costs in this Court and those in the Court of Appeals up to the time our mandate reaches that court.

The case was argued by Mr. John W. Davis for the petitioner and by Mr. Charles E. Hughes for the respondent.

State Taxation—Federal Equity Jurisdiction to Enjoin

Where the lessee of telephone talking sets included such sets as part of its operating property in its report to the state for a gross receipts tax in lieu of all other taxes and paid the tax and the lessor thereafter refused to pay a local property tax on the sets on the ground that such tax was in violation of due process of law, the federal courts of equity have jurisdiction on petition of the lessee, in the absence of a clear remedy at law provided by the state, to restrain the local tax officials from carrying out threats of selling the sets to pay the tax assessed against the lessor, where the carrying out of the threats would disrupt the lessee's telephone system.

Hopkins v. Southern California Telephone Co., Adv. Op. 178; Sup. Ct. Rep. Vol. 48, p. 180.

The respondent telephone company maintained and operated over 300,000 telephones in Los Angeles County, California. The talking sets used in connection therewith it leased from the American Telephone & Telegraph Company, a New York corporation, which held title thereto. All other parts of the system were owned by the respondent.

In making its regular reports to the State Board of Equalization it included the leased sets as part of its operating property and paid thereon a percentage of its gross receipts from operation as a state tax in lieu of all other state and local taxes. Nevertheless the petitioners, county and municipal officials, without making formal objection to the inclusion of the leased talking sets as part of operating property, assessed against the American Telephone & Telegraph Company, as owner, the value of the talking sets and demanded as a tax thereon the rate borne by ordinary tangible property. When this demand was not complied with the petitioners threatened to disconnect the sets, sell them, and so disrupt the system.

The respondent then sued in the federal district court to restrain the petitioners from carrying out these threats, upon the ground that the sets were not

subject to local taxation; that the threatened disruption would do irreparable harm; that to enforce the tax would violate the Fourteenth Amendment; and that there was no adequate remedy at law.

The District Court dismissed the bill, thinking it had no jurisdiction, but its decision was reversed in the Circuit Court of Appeals. Certiorari was granted by the Supreme Court which later affirmed the ruling of the Court of Appeals in an opinion delivered by MR. JUSTICE MCREYNOLDS.

Certain pertinent provisions of the California Constitution, i. e., Section 14, Article XIII, and the Political Code had an important bearing on the result reached. The Constitution provided that a tax in the form of a percentage of gross receipts from operation to be used exclusively for state purposes, was to be paid annually by all telephone and telegraph companies on *their* franchises, roadways, etc., and was to be in lien of all other taxes, state, county or municipal. The Political Code contained similar provisions and added that if any local assessor found any non-operative property included in the report to the State board he was to report the same to the board. The board was to pass on the contest with respect to the question and its decision was binding on all parties unless properly set aside by a court, and each assessor was to note the decision on the assessment roll and assess the property in accordance therewith.

On this state of facts the Court held that the Circuit Court of Appeals had rightly ruled that there was no adequate remedy at law and that equity had jurisdiction to enjoin the acts threatened by the petitioners. With reference to this MR. JUSTICE MCREYNOLDS said:

> Petitioners maintain that under Secs. 3804 and 3819, California Political Code, respondents could have protected their rights by paying the assessed tax and bringing actions to recover. But whether either of these sections applies in circumstances like those here presented is far from certain. Section 3819 gives a remedy to the owner; and Warren v. San Francisco intimates quite strongly that it applies only to actual owners. Whether the lessee who has paid taxes upon the owners' property can recover under Section 3804 is also questionable. Counsel differ widely concerning the meaning of these sections and no opinion of the State court removes the doubt. In no permitted proceeding at law could interest upon payments be recovered for the time necessary to obtain judgments. The County and sixteen municipalities were interested in the taxes demanded and if petitioners had received payments, it would have been incumbent upon them to make prompt distribution. Considering all the circumstances, we find no clear, adequate remedy at law. The equity proceeding was permissible.

The point strongly relied upon by the petitioners was that the gross receipts tax was not in lieu of all other taxes on *leased* property. In discussing this contention the learned Justice pointed out the unsettled condition of the state law on the subject, and concluded the opinion with the following exposition of the objections to holding leased property subject to local taxation under the circumstances:

> If payments of the prescribed part of the gross receipts only relieves from local taxation property actually owned and leaves all held under lease subject thereto, inequalities with possible confiscation would certainly result. Under that theory a corporation with title to half (in value) of its operative property, the remainder being leased, would really pay on account of the portion owned at twice the rate required of another corporation operating the same amount of property and having equal receipts, but holding nothing by lease. And if the ratio between property owned and leased were less, the difference in rate would be still greater. A telephone company which leased everything it used would release no property from taxation by paying the gross receipts tax, while a competitor with equal receipts, by paying the same amount, might absolve from local assessment property of very large value.
>
> These difficulties can not be avoided by saying the lessee will not pay assessments against the lessor and therefore can not complain. Leases are commonly made with reference to taxation. When the lessor discharges the tax the lessee pays rent accordingly. And the Fourteenth Amendment protects those within the same class against unequal taxation; all are entitled to like treatment.
>
> Here respondents have surrendered out of gross receipts the equivalent of the burden imposed upon other property not less valuable than all the operating property in their systems; and now, unless more is paid, disruption is threatened through seizure and sale of essential instrumentalities actually employed to produce those receipts.
>
> We think the purpose of the 1910 Amendment is to tax all operating property of a telephone company by ascertaining the gross receipts and taking therefrom the specified percentage. Thus, the imposition becomes approximately equal to what other property bears. Unless the gross receipts tax be so treated, some very serious questions under the Federal Constitution are almost certain to arise. Witkout an authoritative holding by the State Supreme Court to the contrary, we must conclude the leased speaking sets are not subject to local taxation.

The case was argued by Messrs. Sumner Holbrook Jr. and Everett W. Mattoon for the petitioners and by Mr. Alfred Sutro for the respondent.

Statute of Limitations—Amendment—New Cause of Action

An amended declaration filed more than six years after the cause of action arose averring as new matter that the plaintiff is the assignee of the cause of action, states a new cause of action under the Illinois statutes and is barred by the six-years' statute of limitations applicable to such cases.

Taylor Co., Inc., v. Anderson et al., Adv. Op., 161; Sup. Ct. Rep., Vol. 48, p. 144.

This action was commenced by Taylor Company against the defendants on March 7, 1918, in a federal district court in Illinois for breach of a contract made November 1, 1916, to furnish fuel oil to the plaintiff. At the trial in May, 1924, the plaintiff by leave of court filed an amended declaration. This amended declaration stated as new matter that the plaintiff corporation had been incorporated after the contract was made; that on February 1, 1917, it had assumed the liabilities, and had acquired by assignment all the assets of the partnership which previously had carried on the business and which had made the contract upon which this action was brought. The defendants then pleaded that the cause of action had arisen in Pennsylvania more than six years before the filing of the amended declaration and that since by the law of Pennsylvania the action was barred, it was likewise barred by Chapter 83, § 20 of the Illinois Revised Statutes. In Chapter 83, § 20, it is provided that where a cause of action arises in another state "and by the laws thereof an action thereon cannot be maintained by reason of lapse of time an action shall not be maintained in this state."

On this state of facts the trial court held that under § 18 of the Illinois Practice Act the amended declaration stated a new cause of action which was barred by the six years' statute of limitations, and rendered judgment on a verdict directed for the defendants. The Practice Act, § 18, provided that the assignee of a non-negotiable chose in action might sue thereon in his own name,

> "and he shall in his pleading on oath, or by his affidavit where pleading is not required, allege that he is the actual

bona fide owner thereof, and set forth how and when he acquired title . . ."

That judgment was affirmed by the Circuit Court of Appeals. On certiorari the Supreme Court of the United States affirmed this ruling in an opinion delivered by MR. JUSTICE BUTLER. He first pointed out that an assignee of a non-negotiable chose in action cannot sue thereon in his own name in the absence of a provision such as is contained in § 18 of the Illinois Practice Act, and then referred to the construction placed on § 18 by the Illinois courts. With reference to the latter the opinion contained the following discussion:

> It is established by the decisions of the Supreme Court of Illinois that in an action under that section a declaration that does not state that plaintiff is the actual bona fide owner thereof and set forth how and when he acquired title fails to state a cause of action. And it is also held that a cause of action set forth in a declaration amended to comply with that section is barred if the period fixed by the statute of limitations has expired when the amended pleading is filed. Applying the state law, it must be held that the amended declaration set up a new cause of action which was then barred.

It was further contended that § 954 of the Revised Statutes authorizing amendments to pleadings in the federal courts operated to permit such an amendment as the one made here which stated no new cause of action. This contention also was rejected with the following comment:

> The original declaration alleged an agreement between respondents and petitioner and set it out in "haec verba." It was a letter dated November 1, 1916, addressed to "N & G. Taylor Company" and signed by respondents. The words "Accepted: N. & G. Taylor Co." appeared at the end of the letter. That declaration did not attempt to state a cause of action under § 18 of the state Practice Act. Petitioner did not sue or claim as assignee. No reference was made to the contract between respondents and the partnership. The cause of action there stated never existed. The amended declaration states a cause of action for breach of the contract that was made by the partnership. It cannot be treated as curing a defective statement of a cause of action theretofore attempted to be set up. The change was not merely one of form; the fundamental substance of the claim was different. It is clear that the amended declaration substituted a new cause of action.

The case was argued by Mr. Henry S. Drinker for the petitioner and by Mr. Hobart P. Young for the respondents.

Mandamus—Power of Appellate Court to Issue

A writ of mandamus lies in the Circuit Court of Appeals to compel a district court judge to reinstate a judgment which he, without jurisdiction, has vacated after the term on the ground that the judgment was obtained by perjured testimony.

Delaware, Lackawanna & Western R. R. Co. v. Rellstab, Adv. Op. 228; Sup. Ct. Rep., Vol. 48, p. 203.

This case involved the power of a Circuit Court of Appeals to mandamus a district Judge to reinstate a judgment which he had vacated improperly. The facts were that originally the plaintiff recovered judgment for injury and wrongful death caused by a collision between the plaintiff's truck and one of the petitioner's trains. This judgment was set aside on the evidence of two important witnesses that they had perjured themselves at the trial. A new trial was had and these two witnesses testified for the railroad company and it got judgment. This was affirmed by the Circuit Court of Appeals. Thereafter, the plaintiff introduced evidence before the trial judge that one of the witnesses perjured himself at both trials and in fact knew nothing about the accident. Upon this evidence, after the term had expired the trial judge entered an order purporting to vacate the judgment then in force.

The railroad company then brought the present petition for mandamus in the Circuit Court of Appeals to compel the judge to reinstate the judgment which he had vacated after the unextended term had expired. The Circuit Court of Appeals held that it had no jurisdiction to grant the writ and certiorari was granted by the Supreme Court.

In an opinion delivered by MR. JUSTICE HOLMES it was held that the writ should have been granted, because the Circuit Court of Appeals had jurisdiction and could not deny the writ on the ground that the granting thereof would operate unjustly. The reasoning in support of the decision was stated in the following portions of the opinion:

> However strong may have been the convictions of the district Judge that injustice would be done by enforcing the judgment, he could not set it aside on the ground that the testimony of admitted perjurers was perjured also at the second trial. The power of the Court to set aside its judgment on this ground ended with the term. As the Court was without jurisdiction to vacate the judgment mandamus is the appropriate remedy unless to grant that writ is beyond the power of the Circuit Court of Appeals. We perceive no reason to doubt the power of that Court. It had affirmed the judgment of the Court below. Like other appellate courts the Circuit Court of Appeals has power to require its judgment to be enforced as against any obstruction that the lower Court, exceeding its jurisdiction, may interpose. The issue of a mandamus is closely enough connected with the appellate power.
>
> But it is said that the granting of the writ of mandamus is discretionary and it is implied that if we are of opinion that the Circuit Court of Appeals was mistaken in denying its power to grant the writ, that court still might deny it on the ground that injustice would be done if the judgment were allowed to stand. But neither Court would be warranted in declaring the judgment unjust after it had become unassailable—certainly not on a speculation as to which of three statements is true, when it was known at the trial that the witness was perjured, either at the first trial, as he said, or then—not to speak of the further difficulties that the plaintiff might encounter in the recent decision of "Baltimore & Ohio R. R. Co. v. Goodman." It certainly would be unjust to leave the case in the air, because the District Court had made an unwarranted attempt to set aside a judgment that it had no jurisdiction to touch.

The case was argued by Mr. M. M. Stallman for the petitioner and by Mr. Harry Kalisch for the respondent.

Statutes—Chinese Exclusion—Interpretation by Practical Construction

Section 6 of the Exclusion Act does not authorize the issuance of a certificate of identification to a Chinese subject by a government other than China under whose jurisdiction such Chinese subject is domiciled but not naturalized.

Nagle v. Loi Hoa, Adv. Op. 146; Sup. Ct. Rep., Vol. 48, p. 160.

The respondents were Chinese merchants and natives of China who for some years had resided in French Indo-China. They sought to be admitted to the United States at the port of San Francisco as merchants, under Article II of the treaty with China of November 17, 1880, and presented to the immigration authorities certificates of identification issued by officials of French Indo-China bearing visas of the Ameri-

can consul there. The respondents had never been naturalized under any government.

The Chinese Exclusion Act in § 6 contains the following provisions:

> That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign Government of which at the time such Chinese person shall be a subject. . . .

Acting pursuant to this statute the immigration authorities refused to admit the respondents into the United States upon the ground that they did not have certificates from the Chinese government as required by § 6. The latter thereupon petitioned the federal district court for a writ of habeas corpus, but the court denied the writ. Upon appeal, however, the Circuit Court of Appeals reversed the district court's decision. Thereafter the Supreme Court of the United States reversed the decision of the Circuit Court, thus holding that the conclusion reached by the trial court was correct.

The opinion of the Court was delivered by MR. JUSTICE STONE who stated the issue involved, in the following terms:

> The sole question presented is whether the word "subject" as used in § 6 is to be taken as including only those persons who by birth or naturalization owe permanent allegiance to the government issuing the certificate, or as embracing also those who, being domiciled within the territorial limits of that government, owe it for that reason obedience and temporary allegiance.
>
> The word may be used in either sense. If the narrower meaning be the appropriate one the respondents were "subjects" of the Chinese government, and it alone could issue certificates entitling them to admission. The government of French Indo-China could issue such certificates only to persons of the Chinese race who owed it permanent allegiance.

The opinion directed attention to the view of the Circuit Court of Appeals which thought that since the statute was in execution of the treaty with China relating only to the immigration of Chinese nationals, § 6 had no application to Chinese persons who were nationals of other governments, and consequently certificates were required only in the case of Chinese nationals resident under such governments.

The learned Justice then stated objections to this view, as follows:

> But in this view it is overlooked that the amended Exclusion Act is broader than the treaty. Before the amendment the federal courts had not agreed whether persons of Chinese race who were nationals of countries other than China were affected by the statute. Section 15 of the amended act made all its provisions applicable "to all subjects of China and Chinese, whether subjects of China or any other foreign power." The avowed purpose of the amendment was to alter the act as interpreted in United States v. Douglas, where it had been held to have no application to Chinese subjects of Great Britain. The purpose, therefore, of the insertion in § 6 of the phrase "of such other foreign Government of which at the time such Chinese person shall be a subject," was to require Chinese immigrants owing permanent allegiance to governments other than China to present certificates from the governments of their allegiance.

After mentioning certain authorities and statutes tending to support the contention of the Government as to the meaning of the term "subject" the opinion emphasized in addition the importance of the long and consistent practical construction of the act. In this connection it was pointed out that various officials of both governments had treated the section as requiring Chinese certificates for Chinese nationals residing outside of China. Mention was made likewise of the recommendation of President Cleveland that United States consular officers be authorized to issue certificates to Chinese nationals residing in foreign countries where no Chinese official was resident. It was further stated that the government of China has authorized its diplomatic officers to issue such certificates to Chinese subjects resident in foreign countries and that certificates so issued have been recognized as valid by the Department of State and the Attorney General.

The learned Justice also outlined the legislative history of Article III of the treaty of 1894 and of the legislation reenacting the Exclusion Act. The substance of this was that Article III provided that Chinese subjects might "produce a certificate from their Government or the Government where they last resided"—a provision unnecessary if preexisting legislation had already so provided. On the expiration of this treaty § 6 became the only law on the subject.

The opinion was concluded with the following observation as to the weight of legislative history and practical construction:

> If there could be doubt as to the proper interpretation of §6 standing alone, we think all ambiguity has been removed by the history of the legislation and the practical construction which has been given to it.

The case was argued by Solicitor General Mitchell for the petitioner and by Mr. George W. Holt for the respondents.

Bankruptcy—Preferences—Repossession Under Conditional Sale

Where a seller, as permitted by state law, repossesses himself of a chattel under a contract of conditional sale within four months of the bankruptcy of the buyer, the repossession is not an illegal preference as to other creditors of the buyer.

Finance & Guaranty Co. v. Oppenhimer, Adv. Op. 229; Sup. Ct. Rep., Vol. 48, p. 209; Am. B. R. (N. S.), Vol. 11, p. 214.

This proceeding was commenced by the respondent, trustee in bankruptcy for W. A. Lee, who sued as plaintiff to recover the value of four automobiles which the defendant, the petitioner, had repossessed under a conditional sales contract between it and Lee. The automobiles had been sold under a duly recorded contract of conditional sale and were repossessed on January 10, 1921, by a suit in detinue. On January 20th of that year a petition in bankruptcy was filed against Lee and he was adjudicated a bankrupt in February following. This action by the trustee in bankruptcy was instituted about a year later upon the theory that under the Traders Act, § 5224 of the Code of Virginia, the repossession constituted a preference. It was assumed that that section provided that all property used by Lee in his business including automobiles "shall as to creditors of any such person, be liable for the debts of such person."

In the Circuit Court of Appeals the trustee in bankruptcy prevailed, but its decision was reversed on certiorari to the Supreme Court of the United States, MR. JUSTICE HOLMES delivering the opinion. With reference to the decision under review the learned Justice said:

> We are of opinion that the decision was wrong for the reason given by the dissenting judge below. The Supreme Court of Appeals of Virginia has construed the Traders' Act and has established that "the creditors" in §5224 means creditors having a lien. The lien of the trustee in bankruptcy did not arise until after the property in ques-

tion had come back to the hands of the petitioner, which had reserved title to itself. Therefore the retaking of the property was valid as against the trustee. It could not work a preference unless he represented a claim that was paramount when the property was seized. At that time the petitioner did what it had a right to do as against the bankrupt and simply took what was its own. It did no wrong to any creditor, for no creditor not having a judgment or other lien could have complained so far as the law of Virginia went. The majority of the Circuit Court of Appeals took the distinction between a trustee under a conventional deed of trust for the benefit of creditors and a trustee in bankruptcy, that the former has no power to vacate preferences. But, as we have implied, a party holding security does not create a preference by taking possession under it within four months if he lawfully may under the law of the State.

The case was argued by Mr. S. M. Brandt for the petitioner and by Mr. Joseph M. Hurt for the respondent.

Negligence—Liability to Third Parties for Injury to Property

Where a repair company negligently injures a propeller of a vessel, the repair company is not liable to a third party for damages arising from delay in the use of the vessel under a charter party made by the owners with such third party, without the knowledge of the repair company.

Robins Dry Dock & Repair Co. v. Flint et al. Adv. Op. 142; Sup. Ct. Rep., Vol. 48, p. 134.

The respondents in this case had entered into a charter party with the owners of the steamship "Bjornefjord" for the use of the vessel. By the terms thereof the vessel was to be docked periodically and during such periods payment for the use was to be suspended until she was again ready for service. While docked for repairs on this occasion petitioners negligently injured a propeller which had to be replaced. This replacing caused delay in rendering the ship ready for use and it was for the delay thus caused that this suit was brought. It appeared further that at the time the negligent injury occurred the repair company, the petitioner, had no knowledge of the charter party between the owners and the respondents in this case, and also that it had afterwards obtained a release from the owners for all damages flowing from the injury.

The contentions of the respondents seem to have been (a) that the contract between the owners and the repair company was for their benefit; (b) that they had a property right in the vessel which the repair company had injured; and (c) that an injury to the vessel gave them a cause of action because it interfered with their contract with the owners for the use of the vessel.

A recovery was allowed in the District Court and the judgment there obtained was affirmed by the Circuit Court of Appeals. But this was reversed in the Supreme Court on a writ of certiorari, MR. JUSTICE HOLMES delivering the opinion.

In this opinion it was first pointed out that the theory allowing a cause of action to a third party beneficiary under a contract did not apply here because there was no showing that the parties to the contract intended it for the direct benefit of the charterers.

> The present libel "in a cause of contract and damage" seems to have been brought in reliance upon an allegation that the contract for dry docking between the petitioner and the owners "was made for the benefit of the libellants and was incidental to the aforesaid charter party," etc. But it is plain, as stated by the Circuit Court of Appeals, that the libellants, respondents here, were not parties to that contract, "or in any respect beneficiaries" and were not entitled to sue for a breach of it "even under the most liberal rules that permit third parties to sue on a contract made for their benefit."
>
> Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least, show that it was intended for his direct benefit.

The theory that the charterers had a property right in the ship was disposed of as equally untenable:

> The District Court allowed recovery on the ground that the respondents had a "property right" in the vessel, although it is not argued that there was a demise, and the owners remained in possession. This notion also is repudiated by the Circuit Court of Appeals and rightly. The question is whether the respondents have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter. If they have, it must be worked out through their contract relations with the owners, not on the postulate that they have a right in rem against the ship.

The final contention of the respondents was also rejected, but it was discussed somewhat more fully, as follows:

> Of course the contract of the petitioner with the owners imposed no immediate obligation upon the petitioner to third persons as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else. But as there was a tortious damage to a chattel it is sought to connect the claim of the respondents with that in some way. The damage was material to them only as it caused the delay in making the repairs, and that delay would be a wrong to no one except for the petitioner's contract with the owners. The injury to the propeller was no wrong to the respondents but only to those to whom it belonged.
>
> But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may give rise to a cause of action, no authority need be cited to show, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. The law does not spread its protection so far.
>
> The decision of the Circuit Court of Appeals seems to have been influenced by the consideration that if the whole loss occasioned by keeping a vessel out of use were recovered and divided a part would go to the respondents. It seems to have been thought that perhaps the whole might have been recovered by the owners, that in that event the owners would have been trustees for the respondents to the extent of the respondents' share, and that no injustice would be done to allow the respondents to recover their share by direct suit.
>
> But justice does not permit that the petitioner be charged with the full value of the loss of use unless there is some one who has a claim to it as against the petitioner. The respondents have no claim either in contract or in tort, and they cannot get a standing by the suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents.
>
> The whole notion of such a recovery is based on the supposed analogy of bailees who if allowed to recover the whole are chargeable over, on what has been thought to be a misunderstanding of the old law that the bailees alone could sue for a conversion and were answerable over for the chattel to their bailor. Whether this view be historically correct or not there is no analogy to the present case when the owner recovers upon a contract for damage and delay.

The case was argued by Messrs. James K. Symmers and John C. Crawley for the petitioner and by Mr. Roscoe H. Hupper for the respondents:

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

THE Business of the Supreme Court, by Felix Frankfurter and James M. Landis. 1927. New York: The Macmillan Company. 349 pages. $4.00.

This is a study in the federal judicial system written with that care, scholarship, and ability which we have come to expect of these two members of the faculty of the Harvard Law School. The book attempts to uncover the "technicalities governing the jurisdiction of the federal courts" and "to fit the meaning of the successive Judiciary Acts into the texture of American history." It is a pioneering analysis of the incidence of judicial procedure upon the process of government and of the role of the federal courts in the conflicts over federal relations and between economic interests. The cumulative changes of the last 140 years in the material circumstances of national life are seen to have effected. tardily but necessarily, corresponding changes in the functions, jurisdiction, and procedure of the Supreme Court as an organ of government,—a truism which some minds are still loath to admit. Believing that most modern problems are eventually legal problems, the authors perceive the profound social and economic significance of the judicial power and process, and trace for the first time the development of the Supreme Court's business since 1789 and the conditions under which it has labored and now operates in the disposition of cases.

Out of eight chapters, seven comprise a legislative history of the federal courts from the first Judiciary Act of 1789 to the last in 1925; chapter eight deals with the future of Supreme Court litigation. "A continuous process of empiric legislation" has gradually adapted the federal judiciary to the changing needs of the growing nation, secured justice through law, and adjusted federal relations. This legislation is treated in three broad periods: (1) the period prior to the Civil War; (2) from the Civil War to the Circuit Courts of Appeals Act of 1891; and (3) thence to the Judicial Code of 1911.

The first period begins with the Act of 1789 which devised a judicial organization, conferred supervision over state courts upon the Supreme Court, and established a unique system of inferior federal courts. This act is seen as a response to the problems and controversies of our early history, the needs of trade, friction between the states, and the fiscal necessities of the Union. It created three tiers of courts operated by two sets of judges and provided for circuit riding by the Justices, a system which caused controversy until 1869. Circuit riding was partially relieved in 1793, eliminated in 1801, restored in 1802, and drastically curtailed in 1869. The reader is led through a continuous process of legislative tinkering with the judicial system to meet the territorial needs of an expanding country, to divorce the Supreme Court from the circuit courts, to enlarge and reduce the duties of the federal courts, and to amend or abolish the circuit system. Judicial reform waited always on "legislative sterility" and political rivalry, while the mounting business of the courts outran their ability to dispatch it. The Supreme Court was compelled to seek relief through its control over practice, but relief from Congress was slow to come.

The second period begins with the reflex of post-war reconstruction on the business, jurisdiction, and structure of the judiciary. Patent, war, admiralty, and bankruptcy litigation, extensions of federal jurisdiction, the National Bank Acts, the Court of Claims, and constitutional amendments swelled the dockets and made the influence of the federal courts all-pervasive while exhausting their resources. Between 1865 and 1891 a struggle to eliminate the circuit duties of the Justices and to establish an intermediate appellate tribunal went on against legislative inertia, political hostility, the issues of states' rights and absentee ownership, and the drift of habituation, mitigated only by increases in personnel and minor limitations upon jurisdiction in the acts of 1869, 1875, and 1887. But in spite of the lack of speedy justice and quick review, real relief was persistently postponed while Congress clashed over remedies and the purposes of the courts, the House favoring and the Senate resisting curtailment of power. Finally, the establishment of the nine circuit courts of appeals in 1891 brought genuine relief and the "first structural modification in the federal judicial system since its creation."

The third period in the chronology of the federal courts also brought increased business to the Supreme Court thanks to litigation after the Spanish-American War, regulatory and social legislation, the creation of administrative commissions, and District of Columbia litigation. Defects in the Act of 1891 regarding interlocutory injunctions and receiverships were corrected in 1895 and 1900. In 1897 finality in all criminal cases, except capital offenses, was given to the circuit courts of appeals, thus remedying another defect. In 1907, after repeated miscarriages of justice, single judges in the district and circuit courts were deprived of the ability to nullify federal criminal legislation and resort to the Supreme Court was granted in cases arising under such laws designed to achieve "some social betterment." Subsequent acts have been chiefly concerned with restricting the right of appeal to the Supreme Court. In 1912 the Court came to its own rescue by excluding from appeal "the purely local laws of the District" of Columbia. Meanwhile, the circuit courts had ceased to justify their existence and the Judicial Code of 1911 eliminated them and vested all original jurisdiction in the district courts. The twenty-year movement to reduce the range of the business of the federal courts succeeded in the Judicial Code in increasing the pecuniary amount necessary for resort to these courts, but it failed to remit to the state courts litigation affecting foreign corporations. In addition to the abolition of the circuit courts, the Code secured the unification of the scattered legal provisions relating to the business of the federal courts. "It is a systematic statement of the structural principles defining the role of the federal courts in the American constitutional scheme."

In their survey of the judicial scene since 1911 the authors devote a chapter to the travail out of which three Federal courts of specialised jurisdiction have been created to handle litigation arising from the new administrative tribunals. The Court of Customs Appeals, set up in 1909 to pass upon tariff law administration by the Board of General Appraisers, has justified its existence, the authors believe. The United States Commerce Court was created in 1910 to handle litigation arising from the regulation of railways by the Interstate Commerce Commission. Its birth and brief turbulent career, curbed by the Supreme Court and saved for a time by President Taft's veto of the appropriation bill to which the proposal for its abolition was attached, its embarrassment by the impeachment of Judge Archbold, one of its members, and its abolition in 1913 by legislative edict, are recounted with lively interest. The story of the unsuccessful attempt over a score of years to create a special court for patent litigation is skillfully told. The authors raise the question whether the growth of a distinct body of administrative law will not in time require a special court of administrative review.[1]

Another chapter deals with the "progressive contraction of jurisdiction" of the Supreme Court from the Judicial Code to the post-war judiciary acts. Indeed, if Congress has unduly delayed this process and if the Court has sometimes undertaken avoidable burdens, nevertheless Congress has rarely broadened the base of resort to the highest court. Restriction was essential if the Court was to cope with the rising tide of litigation augmented by the legislative mills, the Fourteenth Amendment, and the flow of social and regulative legislation. The labor standards cases to which such legislation gave rise not only witnessed the "application of a new technique in constitutional arguments wherein an appreciation of facts is the decisive element," but they also "precipitated the movement to alter the appellate jurisdiction of the Supreme Court over state courts." Conflicting decisions by state courts on the validity of workmen's compensation legislation disclosed the geography of constitutionality and led in 1914 to the grant of appellate control over state courts: the only time since the Judicial Code when Congress has broadened the jurisdiction of the Court. Another attempt which failed was the Cummins Amendment of 1922, being private legislation for a particular litigant, which was nullified by interpretation and exorcised in the Act of 1925. Meanwhile, the growth of the federal courts' business stimulated by the World War and the "downpour of employers' liability litigation" was accommodated in 1915 and 1916 by acts decreasing the obligatory jurisdiction of the Supreme Court in bankruptcy cases, relegating trademark and employers' liability litigation to final disposition by the circuit courts of appeal, attaching Porto Rico to the first circuit, restricting reviews from the Philippine Islands to *certiorari*, cutting down the period for appeals, and lengthening the Court's term. *Certiorari* was also extended as the only means of securing review in certain cases.

This brings the authors' historical approach to the Act of 1922 in which Congress at last turned its attention to integrating judicial organization and administration. An eighteenth-century system built around an independent judiciary, with federal judicial districts confined within state lines, was inadequate to modern needs and conditions and largely responsible for popular dissatisfaction with the administration of justice. The recent history of judicial reform begins with the 1909 proposals of the American Bar Association which led to the municipal court movement in our larger cities, the establishment and work of the American Judicature Society, and the creation in Wisconsin in 1913 of the first judicial council. The movement was directed into federal channels by ex-President Taft, whose proposals for a mobile federal judicial force and a judicial council have been enacted by Congress since 1914. Mobility was first confined to the second circuit and the Commerce Court judges, but in 1922 Congress reluctantly consented to the assignability of judges by the Chief Justice upon certificates of need and dispensability, to the creation of a judicial council, and to an increase in the number of federal judges, recognizing thus the dependence of successful adjudication upon firm articulation of the whole system. The annual conference of the nine senior circuit judges with the Chief Justice has already become a permanent and invaluable feature of the federal judicature, serving Congress as legislative counsel and the lower federal courts as promoter of effective administrative standards. It has resulted in "more effective coordination of the existing personnel" with the judicial business of the nation without further legislation, reforms in bankruptcy administration, changes in the equity rules, rules governing appeals from the Board of Tax Appeals, rules for the prompt dispatch of business, and the removal of abuses in the examination of jurors, in granting bail after conviction, in sentences for the same offense, and in conspiracy charges. It has sought to relieve the district courts of petty prosecutions and to devise a plan for the improvement of judicial statistics.

One chapter is devoted to the Judiciary Act of 1925 which, by curtailing the Supreme Court's jurisdiction, completed Chief Justice Taft's program of judicial reform. Much of the Court's business was still not germane to its prime purposes, i.e., "to resolve conflicts among coordinate appellate tribunals and to determine matters of national concern." Prolific sources of such unrelated business were cases coming from the district courts, the Court of Claims, and the District of Columbia Court of Appeals. For the deflection of such cases the circuit courts of appeals were recognized to be available and to them the Supreme Court turned in the Judges' Bill. This bill proposed a "drastic transfer of existing Supreme Court business to the circuit courts of appeals," eliminated obligatory review with certain exceptions, revised and restated the statutes relating to appellate jurisdiction, and proposed minor procedural reforms. Espoused by the Chief Justice, it passed Congress after minor amendments in the Senate and meagre debate in the House. As a result, the Supreme Court now receives cases only from the district, state, and circuit courts of appeals and in only three types of cases is review free from discretion. Thus the Court can now confine itself to constitutional and national issues. Recent decisions have indicated certain "omissions and ambiguities" in the Act of 1925, possibly productive of some jurisdictional confusion, but they also indicate that "the Supreme Court is likely to resolve all doubts against the assumption of obligatory jurisdiction." The Court has revised its rules to handle the flood of petitions for *certiorari* now coming to it. The authors suggest this flow of petitions be limited to a maximum number per week and that the Associate Justices share the burden of reporting on them. In cases coming up on *certiorari* they also suggest that review be restricted to the federal questions involved and

1. *Cf.* John Dickinson, *Administrative Justice and the Supremacy of the Law*, published since the book under review was written and reviewed in 13 Am. Bar Ass. Jour. 623.

that the Court ought not to be expected to pass on issues of fact. They raise the question of excluding from the federal courts litigation resting solely on diversity of citizenship and the burden of receivership proceedings and they would entrust state courts with the enforcement of federal police legislation. Thus there remains the problem of apportioning judicial power between state and federal courts.

The final chapter of the book discusses the future of Supreme Court litigation. Further relief by restriction of the right to resort to the Court is not expected, for "the Act of 1925 has cut the Supreme Court's jurisdiction to the bone." Future remedies proposed by the authors include shunting federal litigation to the states at its source and developing a better understanding of issues and materials, a better equipped bar, and a better technique. In tabular form they trace the nature and increase in Supreme Court business from suits between individuals in 1825 through common law topics and federal specialties to the control of economic enterprise which now bulks largest in the Court's business. Other tables compare the business of selected state and British courts in 1925, disclosing the British Privy Council in a role comparable to our Supreme Court. The chief functions of the latter are seen to be adjusting federal relations and interpreting the constitution, both dependent on adequate data and both involving the interplay of knowledge and personal outlook in the formation of judgments. The special character of its business is shown in the use of *amici curiae;* the need of a specialised technique for finding and understanding facts; and the reliance on such modes of proof as legislative judgment, legislative recitals of reasons for enactments, common knowledge and books of reference, briefs of counsel, and evidence of the warrant for legislation. The authors stress in conclusion the dependence of the Court upon extra-legal authorities, the opportunity of lawyers to devise improved methods for elucidating issues, the responsibility of the law schools for the intellectual elevation of the bar so that lawyers will be better equipped to comprehend the issues and ideas of the age, and, finally, the training, experience, and qualities of political and industrial statesmanship demanded of a great justice. Tables listing 610 cases and 275 statutes cited in the text or footnotes conclude this brilliant book.

Too much credit can not be given Professors Frankfurter and Landis for their contribution to our knowledge of the character, growth, and disposition of the business of the Supreme Court. Their study is a masterly and highly competent work, clarifying the whole history of the Court in its legislative and administrative aspects and rendering an invaluable service to bench, bar, Congress, and students of legal institutions. It is more, indeed, than a history, for at least two important recommendations derive from the study in addition to those mentioned above: (1) the need of monograph studies of individual courts, and (2) an effective system of judicial statistics including "an annual detailed analysis of litigation, the courts whence cases come, the dispositions made of them, the nature of the questions involved, etc." The book is profound in its grasp of the underlying assumption, the institutional significance, and the social implications of the Court. The authors see no artificial separation between the organs of government; they show the decisive influence on output of jurisdiction, machinery, and procedure, judicial learning and outlook, and the predominant activities of contemporary life; they recognize that consequences flow from legislation not contemplated or intended by its framers, that legal problems are administrative problems, and that the term "law" comprehends many different types of litigation variously administered by the courts; they suggest that the reconciliation of "law in action" with "law in books" is "perhaps the central juristic problem of our time;" they emphasize that "the judiciary intervenes at highly sensitized regions in the economic and political life of the nation;" they recognize the influence of a continental federation upon the judiciary acts and of individual preconceptions upon the constitutional interpretation of words so vague and neutral that their meaning must depend upon the economic and social views of the justices translated into judgment; they concede, with Dean Pound, the limited competence of courts to know present facts and grasp technical issues, and, with Mr. Justice Brandeis, the conflict between modern social needs and legal institutions inculcated by, and holding over from, the discipline of life in the eighteenth century.

The text of this study is exceedingly well documented. In eight chapters of 318 pages the wealth of data given in the margin as footnotes adds up by actual measurement to 138 pages. If this book is a representative sample of the scholarship and understanding of our law school faculties, much may confidently be expected from the lawyers of the future.

GEORGE B. GALLOWAY.

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The Case of the S. S. Lotus, 1927. Leyden; A. W. Sijthoff. Pp. 107. This is number ten in the Collection of Judgments, in the Publications of the Permanent Court of International Justice. It is a paper book of 108 pages, printed in both French and English, containing a statement of the facts and opinions of the judges of the court in a very interesting and what will no doubt be a famous case. On August 2, 1926, the Lotus, a French vessel, collided with the Boz-Kourt, a Turkish vessel. The latter sank, and eight Turks perished. The commanding officer of the Lotus was arrested in Constantinople and charged with manslaughter. France protested, maintaining that on principles of international law the Turkish courts had no jurisdiction. Turkey offered to submit the question to the Permanent Court and France acquiesced in the proposal. The case was submitted in due course, arguments held in August, 1927, and in September the court announced its decision. The judges being divided, six each way, the President gave the deciding vote in favor of Turkey's contentions. All six dissenting judges filed separate opinions, so the discussion covered a broad field. It is to be noted that the effect of the defendant's act took effect on a Turkish vessel. This narrowed the question of jurisdiction before the court. The case has been summarized and commented upon in various law journals; more comments will doubtless be forthcoming. For an excellent summary, see Berge, "The Case of the S. S. Lotus", 26 Mich. L. Rev. 361-383, Feb., 1928. A shorter treatment may be found in a note in the February, 1928, Yale Law Journal, p. 484.

HERBERT F. GOODRICH.

Ann Arbor, Michigan.

Conflict of Laws, by Herbert F. Goodrich. 1927. St. Paul: West Publishing Company. Pp. xii, 500. $4.50. Professor Goodrich says in his preface that he has attempted to make a "modern usable work." In this attempt he has succeeded. As an exposition of the content of the decisions the book will be a

valuable help to both practitioner and law teacher. Because of the inherent difficulties of the subject matter it will be less usable as a textbook for students unless combined with a good case book.

As a clear statement of the decisions the book could hardly be improved upon. As it is a textbook for students, however, it would seem that more detailed discussion of the fundamental bases or principles of the subject might well have been included. In the two or three places where such discussion is most called for by the nature of the subject matter this discussion is disappointing. For instance, in the section on the "true nature of Conflict of Laws rules" it is pointed out that the subject matter is part of the law of each state, but the author fails to give any fundamental principles applied in the development of this branch of the law of each state. There are two short sentences to the effect that "rights once vested under the law continue until destroyed" (p. 10) and "such rights are recognized and enforced in one state although they have come into being in another" (p. 10.) This is the first mention of "rights acquired in other states" and almost the only mention, except incidentally in the various discussions. The author's theory can be inferred from these brief statements and his notes thereto, as the theory of the enforcement in the forum of foreign acquired rights. He does not explain his use of the terms territorial law and "state." Placing the subject matter upon the basis of the securing in the forum, of interests as they are secured in the place where the facts in question occurred, would have done much to clarify and make easier the solution of new problems.

The same difficulty appears in the chapter on Substance and Procedure. In many of the cases where the courts have dealt with this question they have merely used labels, such as evidence, manner of procedure, or pleading, or, as in the cases on the statute of frauds and statute of limitations, have followed blindly the mere literal meaning of words, such as "no action shall be brought." The author attempts an explanation by adopting Professor Beale's classification of rights as primary, secondary, and remedial; remedial rights being the creation of the law of the forum. This, however, only postpones one step the question of when a right is remedial. It furnishes no test. The author also suggests the explanation that procedure "concerns how and not what is to be proved." Matters, however, of substantive law can be stated as "how" and matters of procedure as "what." It would seem that the underlying principle should be the securing of the interests of the parties, by treating as substance every matter which the forum can conveniently manage so to treat.

The author's inclusion of Renvoi under the topic Domicile may be questioned. Problems of Renvoi could arise in cases other than those where domicile and nationality are different and have different Conflict of Laws rules. Renvoi should be discussed, if at all, in the chapter dealing with the general principles of Conflict of Laws.

The chapter on Contracts is perhaps the best in the book. The author makes a strong defense of the rule that the law of the place of making should govern problems of essential validity. In his discussion of the place of performance rule he makes too much of a theoretical difficulty that the law of the place of performance can not "extend" into the place of making and have extra-territorial effect (p. 23.) His short concise paragraphs on the actual state of the decisions are exceedingly well done.

In the chapter on Torts there is a brief reference to the protection of interests as an explanation of the rule that the law of the place where the tort was committed governs. Perhaps the author's adverse criticism of the use of the public policy argument to deny a plaintiff relief may help make some good law in the future.

In the discussion of jurisdiction for divorce the definition of matrimonial domicile as "the place where the parties last lived as husband and wife, with the intent of making that place their home" (p. 295) is, it is submitted, too simple. It fails to take into account the question of the justification of either the husband or wife in acquiring a new domicile apart from the other, which, since the decision of *Haddock vs Haddock*, 201 U. S. 562, has become a jurisdictional fact which can be an issue wherever the validity of the divorce is questioned. It also fails to consider cases where each party acquires a new domicile. The author also fails to point out the inconsistency of a position that the decree at the domicile of one party only, without service, is valid in that state and may be given recognition elsewhere, but is not entitled to full faith and credit under the Constitution. The question might well be asked whether, if the court of the domicile of one party only does not have jurisdiction to render a valid decree entitled to full faith and credit, the recognition of that decree to defeat an action by the other party either in the domicile or elsewhere is not violative of the due process clause of the Fourteenth Amendment.

The chapter entitled Inheritance might perhaps more accurately have been called Succession upon Death, as it includes movables as well as immovables, and testamentary succession as well as intestate succession. The discussion of the law governing the construction of a will of land is excellent. The futility of dealing with the question as if the testator's actual intent were being sought and in the effort applying the law of his domicile as a canon of interpretation is pointed out. The application of the law of the situs in cases where the testator's real meaning can not be ascertained in fact avoids the hopeless attempt to distinguish between interpretation, construction, and effect.

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Signed Articles

As one object of the American Bar Association Journal is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this Journal assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

MARBURY VS. MADISON AGAIN

Principle of Judicial Propriety Where Constitutional Questions Are Presented — While Court Postponed Decision as to Legislative Competence It Passed Immediately on Constitutional Questions Involving Executive Authority — Opinion of Mr. Justice McReynolds in Myers vs. the United States—Was It Necessary to Declare Portion of Judiciary Act Void?

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THE case of Marbury v. Madison (1 Cranch, 137) is a great leading case in constitutional law, which is of perennial interest. It is so because in that case the Supreme Court for the first time declared an act of Congress unconstitutional. For that reason and for others it is of significance in constitutional history. The case arose from the refusal of James Madison, the Secretary of State under Jefferson, to deliver to William Marbury a commission to act as Justice of the Peace in the District of Columbia. Marbury had been duly appointed and confirmed; his commission had been signed but not delivered; and he applied to the Supreme Court for a mandamus directed to Madison and ordering the delivery of the document. Chief Justice Marshall in his opinion discussed at length Marbury's right to the possession of the commission, but decided that the mandamus could not issue because the case was not one of the cases coming within the original jurisdiction of the Court in accord with the Constitutional provisions. A portion of the Judiciary Act purporting to give such jurisdiction he declared void as beyond Congressional competence.

A recent article in this Journal presents an argument, the purpose of which is to establish the fact that a large portion of the decision of the Court in that case was not, as is frequently asserted, obiter dictum. The article's main contention is to the effect that Marbury's right to his commission had to be considered and acknowledged before the Court was justified, under proper principles of judicial approach to such problems, in taking up the question of constitutionality of congressional legislation, or at least before the court could properly declare that Congress had exceeded its authority.

One principle of judicial propriety seems to be this: A court will as a general rule not pass upon a constitutional question and declare a statute invalid unless a decision upon that very point becomes necessary to the determination of the cause.[1] But surely that principle does not involve the duty of passing upon the merits of a controversy when it appears on the face of the pleadings that the court is utterly without jurisdiction. In the Marbury case it was necessary, the Chief Justice believed, to pass upon the constitutionality of a clause in the Judiciary Act; this being so, it would have been necessary, whatever might have been the opinion of the Court on other questions involved, because the jurisdiction of the court was the constitutional question. Let us suppose that Marshall had decided—or more properly given his opinion—that Marbury was not entitled to his commission, would Marbury have been bound by the opinion as a decision? Would he have been precluded from going to a court of competent jurisdiction? Would the decision of the Supreme Court have had any effect in any other court in the land as fixing a constitutional principle or any principle of law whatsoever? And if not, would Marshall's opinion have been anything but obiter, under any definition of the term?

The principle of judicial propriety in dealing with questions of legislative competence may be stated in another way; viz., that if the record presents a constitutional question and also some other and clear grounds on which a court may rest its judgment, and thereby render the constitutional question immaterial to the case, the court will choose the latter course of procedure and dispose of the case without discussing the constitutional question.[1] This principle, of course, refers especially to such constitutional questions as involve the duty of passing upon the validity of the acts or conduct of the political branches of the government. But if a court has no authority to pass upon the controversy between the parties, we are not led to say that it must attempt to do so or at least indulge in learned pronouncements, before it passes upon the question of constitutionality. That is to say: If the Marbury case could have been decided without declaring the Judiciary Act void, then Marshall in so declaring would have been guilty of a breach of the tables of the law of judicial propriety; but as the case could not be decided at all on its merits, he would have been justified in passing immediately to the constitutional question. Especially must this be so, when he had no authority to have a judicial opinion on the merits of the controversy. It is said, however, that the whole controversy had to be examined before it could be determined that a mandamus was the proper process to issue. The answer is that Marbury asked for a mandamus; he could not set up in his pleadings a controversy over which the Court had jurisdiction or a right which the court could uphold; and such absence of jurisdiction was apparent on the face of the pleadings. The absence of jurisdiction was not due to the particular writ asked for, but primarily to the nature of the parties. It is to be presumed that, had Marbury instituted a suit in the Supreme Court to recover $5,000 from James Madison, the Court would

1. Cooley, Constitutional Limitations, 6th Ed., p. 196, referring to Hoover vs. Wood, 9 Ind., 286, 287 and other cases.

1. Ibid.

scarcely have stopped to consider whether the action ought to have been in trover instead of assumpsit, before deciding that it had no authority to entertain the suit.

Furthermore, it should be noticed, the learned Chief Justice did pass upon a constitutional question involving the authority of a co-ordinate branch of the government, the executive, in a case he had no right so much as to entertain if his own decision was correct. The constitutional questions involved in Marbury v. Madison were not confined to that of congressional competence. The right of Marbury to his commission, the duty of the Secretary of State to deliver it, the duty of the Secretary to act under instructions from the President, and the right of a President to remove an officer, were constitutional questions of singular importance. The Chief Justice showed no reluctance in passing upon those questions, though he knew that his opinion was unauthoritative and hence legally not conclusive. The very thing, then, which is pointed to, as justifying a postponement of the constitutional question till after an opinion had been rendered on the merits, was a violation of the rule of judicial propriety; a constitutional problem involving constitutional competence was discussed and the law announced, when there was no need of doing so—in this case no authority to do so. Probably no one will deny that the cases of Kendall v. United States (12 Pet. 524) and United States ex rel. v. Guthrie (17 How. 284), and Myers v. United States were cases bearing on the constitutional authority and competence of the executive. If those cases were such, so was Marbury v. Madison.

In the recent case of Myers v. the United States (272 U. S. 52), Chief Justice Taft pronounced the opinion of Chief Justice Marshall, as far as it bore on the right of the President to dismiss an officer, to be obiter dictum (Ibid. 140, 141). Justice McReynolds, dissenting, said "The point thus decided, [Marbury's title to his commission] was directly presented and essential to a proper disposition of the case." (Ibid. 217). We thus find a justice of the Supreme Court declaring that a constitutional question involving the authority of the executive can be decided by a court in a case which it has no right to entertain, and in order to delay a decision on the authority of Congress it may pass upon the constitutional authority of the President and his Secretary. Justice McReynolds further said, "If the doctrine now advanced had been approved there would have been no right to protect [to be protected] and the famous discussion and decision of the great constitutional question touching the power of the court to declare an Act of Congress without effect would have been wholly out of place." Of course, the learned justice's conclusion is not sound. The question of the competence of Congress could and should have been raised at once and, if necessary, by the Court itself, to determine whether it had jurisdiction, and by that method of approach the long discussion of judicial power would have been just as appropriate and just as necessary.

"The established rule is," the justice continues, "that doubtful constitutional problems must not be considered unless necessary to the determination of the cause." (Ibid. 217). This, it must be said, appears to be a dangerously loose statement of the principle. But accepting its validity, we must conclude, as we have already said, that the authority of the President and the duty of his Secretary of State, constitutes a doubtful constitutional problem, and it ought not to have been passed upon and a solution announced unless necessary to the disposition of the case; and it was not necessary. "The Court must have appreciated," Justice McReynolds says, "that unless it found Marbury had the right to occupy the office irrespective of the President's will there would be no necessity for passing upon the much-controverted and far-reaching power of the judiciary to declare an act of Congress without effect." So by this reasoning, Marshall's opinion was not obiter dictum, but an authoritative decision, rendered in a controversy over which the court had no jurisdiction; and by such a court and such a decision poor Marbury would have found his rights determined, had the court decided, though without jurisdiction to entertain the case, that he had no legal claims to the much coveted commission. The well-known maxim of the law to the effect that it is a duty of the wise judge to extend his jurisdiction is here amply and humorously illustrated. The learned Justice McReynolds seems to hold that a court, rather than declare an act of Congress void because the act is beyond the constitutional competence of Congress, may itself go beyond its competence as expressly prescribed by the Constitution. This seems to be carrying the rule of judicial propriety very far; yet, by Justice McReynolds' reasoning, such would have been the exact situation, had Marshall decided that Marbury had no right to the commission.

Someone, seeking to sustain the procedure of the great Chief Justice, may insist upon a very narrow interpretation of the word, obiter; but at all events we must come to the conclusion that everything said by Marshall concerning Marbury's title was distinctly unauthoritative and in no sense constituted a decision. It was legally valueless. If there is anything fundamental in law, I should say it is that the acts of a court wanting jurisdiction are void. "Where a court by law has no jurisdiction of the subject matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to the action, either by voluntarily commencing the proceeding as plaintiff or as defendant by appearing and pleading to the merits, or by any other formal or informal action."[2] The portion of the opinion of Marshall which deals with the merits of the controversy and with the obligation of the Secretary of State could have no effect even as authoritative precedent anywhere or any time. If then the opinion was not obiter, we shall need to find another word to define the gratuitous opinion of a judge in a controversy he has no jurisdiction over.

Justice McReynolds also says, "In the circumstances then existing it would have been peculiarly unwise to consider the second and more important question [the validity of a portion of the Judiciary Act of 1789] without first demonstrating the necessity thereof by ruling upon the first" [Marbury's right to his commission]. To the learned justice's interpretation of conditions existing in 1803, we are justified, with all due deference, in taking exception. It is true the existing circumstances were

2. Cooley, *Constitutional Limitations*, 6th Ed., 401, 402. If a court "assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and rights of property cannot be divested by means of them." Ibid., 491.

trying. Partisan feeling ran high. The Court itself was in a critical position. The whole Federal judicial system was endangered by what the Jeffersonians believed to be the thoroughly unwarranted and improper methods of the lower judiciary in handling the Sedition Act. The repeal of the Judiciary Act of 1801 was accompanied by much discussion about the courts and some discussion concerning the right of a court to pronounce an act void. The Federalists advocated and defended such right. Some of the Republicans denied and scorned it. Had the Supreme Court dared to pronounce the repealing Act unconstitutional, very serious consequences might have ensued. Now, it is an ungracious task to point out that the Chief Justice, whom we all rightly consider a man of monumental ability and of strict probity, one of the greatest jurists of all time, had a personal interest and personal feeling in this matter of Marbury's title to his commission. I am not prepared to say he ought not to have sat in the case; but he had acted as Secretary of State till the end of Adams' term and had not seen to the delivery of the commission. To say that Marbury's failure to get his commission before Adams and Marshall lett office was Marshall's own fault, may not be quite fair, and certainly one hesitates to use the words. But he wrote, before the Marbury case was instituted, "I should however have sent out the commissions which had been signed and sealed but for the extreme hurry of the time and the absence of Mr. Wagner who had been called on by the President to act as his private secretary."[3] His position was a delicate one.

It is difficult to see how sending the Secretary of State an order to show cause why a mandamus should not issue, a step actually taken, tended to allay the existing irritation. And it is difficult to believe that the course followed by the Chief Justice in pronouncing on Marbury's rights, when the case came up for decision, was peculiarly wise. By this course, fuel was added to the flame of criticism; and the leader of the Republicans, for years to come the most influential politician and statesman in America, did not weary in his suspicion of the Court and his dislike of the Chief Justice. If the dignity and security of the Court were matters of profound importance, and they must be so considered, the peculiarly wise thing to do, we are compelled to believe, would have been to deny the application for a mandamus without first branding the President and the Secretary of State as law-breakers. Had the Court declared the last clause of the thirteenth section of the Judiciary Act void, and, without entering upon a discussion of Marbury's right to his commission, refused to issue the mandamus, which the Court had no authority to issue, he would have supported the authority of the Court, satisfied the Federalists in respect to their main contention, and not antagonized his political opponents.

But Marshall's course in Marbury v. Madison is open to another and even more serious objection. Thus far we have been taking for granted that the decision of the Court, as distinguished from the opinion of the Chief Justice concerning Marbury's rights, was warranted and correct. There was, however, no real need of declaring a certain portion of the Judiciary Act of 1789 unconstitutional. I do not believe any court would now take that position. The learned Justice really manufactured an opportunity to declare an act void. He considered and declared void a portion of the thirteenth section of the Judiciary Act of 1789 authorizing the Supreme Court "to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." We find in these words no specific statement that authority to issue a mandamus is intended to be conferred as the basis of an original proceeding—certainly not an original proceeding beyond the jurisdiction of the Court. There is nothing in the Judiciary Act indicating any *express* intention to extend the original jurisdiction of the court beyond the limits set down in the Constitution. There is nothing, moreover, distinctly *implying* such an intention; there is nothing in the context of the words quoted indicating or at least necessarily implying any such intention.

This conclusion may appear to be more plainly justified if we give a fuller quotation from the Act in question: "The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." Surely these words may quite properly be held to mean that, in controversies of such nature as to be within the jurisdiction of the Supreme Court, the writ of mandamus may issue from the Court. If the section in question was intended or appears to have been intended to refer to original as well as appellate proceedings, mandamus might issue in an original proceeding involving ambassadors, other public ministers, and consuls, and when a state is a party (Court, Art. III, Sec. 2, Par. 2); it might be used as a means of performing a duty of the Court as an appellate tribunal. On application in an original proceeding, for example, a mandamus might possibly issue directing a postmaster to hand over a letter to a consul or ordering an official of the District to perform some other duty legally incumbent upon him. It might conceivably issue at the suit of an ambassador and direct an officer of the government charged, let us say, by a treaty with an administrative duty, to perform that duty. The right of the court to issue mandamus in the execution of its appellate authority was acknowledged by the Chief Justice in the Marbury case and was exercised six years later when a preemptory mandamus was directed to Judge Peters of the Pennsylvania district (United States v. Peters, 5 Cranch, 135).

What the Court objected to in the Marbury case was that portion of the Act authorizing the issue of the writ to "persons." "Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original acti n." This assumes that in no case, in the exercise of its proper and constitutional jurisdiction, the Court might find it necessary or suitable to issue the writ. It is a noteworthy fact that the present Judicial Code of the United States now

3. Letter of March 18, 1801, quoted in A. J. Beveridge, *Life of Marshall, III*, 124-5.

provides for the issuing of a mandamus "to persons holding office under the authority of the United States where a State or an Ambassador, or a Consul, or a Vice-Consul is a party." (Sec. 342). The above quoted assignment of authority, after the words "United States," is an addition to the original act of 1789. The question is: Could not and should not the latter Act have been interpreted in 1803 as meaning just what Congress in a later Act specifically said—that is to say, as recognizing or bestowing the right to issue mandamus in cases coming properly within the Court's jurisdiction?

Chief Justice Marshall could have denied the application for the mandamus and still not have declared a portion of the Judiciary Act void. He could have done so by simply saying that, while it had been asserted at the bar, if it were so asserted, and while it might appear on the surface, that Congress had in the thirteenth section of the Act sought to extend the original jurisdiction of the Court and had by so doing transcended the constitutional authority of Congress, the Court could see no good reason for thus reading that section, and the Court must suppose and hold that the section was intended only to grant the right to issue mandamus in controversies coming properly within the jurisdiction of the Court as prescribed by the Constitution. Such a ruling would have been entirely justified by principles of statutory construction; and, in fact, any other ruling seems forced. This method of handling the subject would have been in accord with judicial respect for the coordinate branches of the government and in accord with those general principles of consideration and respect which were developed in the nineteenth century. "Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution and give it the force of law, such construction will be adopted by the courts." (Newland v. Marsh, 19 Ill. 376, 384). It is the duty of the Court to adopt a construction of a statute which, without doing violence to the fair meaning of words, brings it into harmony with the Constitution (Grenada Co. Supervisors v. Brogden, 112 U.S. 261). Even when no constitutional question is involved, a court in construing a statute, is inclined, when there is reasonable ground, so to construe it as not to conflict with well established legal principles and fundamental rights under the common law.

In an endeavor to understand Justice Marshall's decision, we are led to consider these facts, in addition to the political excitement of the time. I. In the last paragraph I spoke of the methods of approach to a constitutional question and the principles of construction followed by the Court, as those methods and principles were developed in the nineteenth century. It may, therefore, be unjust to expect the learned Chief Justice to act in accord with principles not fully established, but to be completely formulated in the decades ahead. And yet the general principles of statutory construction, when a statute seriously alters the common law, were very old in 1803. After all, this was Chief Justice Marshall's first constitutional case. His fame rests especially on the basis of those able and momentous decisions which began with McCulloch v. Maryland (1819) and ended with Osborn v. The Bank (1824) —five critical years with decisions of almost tragic importance—though I do not wish to be understood as considering unimportant or unable the decisions before and after that critical lustrum. It was in those years that he gave forth the decision of Cohens v. Virginia, which the student of history is inclined to think the greatest and most influential of all. II. Charles Lee, the counsel for Marbury, spoke in his argument before the Court of three previous cases in which there had been an application for a mandamus.[4] Two of these cases (Chandler v. Secretary of War, and U. S. v. Hopkins) are not reported; but, according to Lee, arose in 1794. In each of these instances the Court refused to issue the mandamus, but apparently not on the ground of want of jurisdiction. In fact Lee says: "Hence it appears there has been a legislative construction of the Constitution upon this point, and a judicial practice under it, for the whole time since the formation of the government." (1 Cranch 149). In using these words, he appears, we judge from the context, not to be speaking of the constitutionality of the thirteenth section of the Judiciary Act, but of the suitability of issuing the writ directed to a high official of the government. If the Court, in the cases Lee referred to, had apparently, though by no direct decision, considered the Act authorizing the mandamus as conferring original jurisdiction on the Court, and had by its silence seemed to hold the Act constitutional, then Marshall may have felt the necessity of asserting that the statute could not extend constitutional jurisdiction, and he may have felt even the necessity of pronouncing the Act in question to that extent unconstitutional and without effect.[5] Of course, as explained above, the same practical result could have been secured by such an interpretation of the statute as to make a declaration of its invalidity unnecessary.

Without touching again on the topics discussed and the conclusions reached in the earlier pages of this article, one or two conclusions concerning the importance of the decision may be given. There was strong temptation to display the power of the Court; some persons apparently would now justify the decision on grounds of political policy as opposed to juristic necessity. Viewed after the lapse of a century and a quarter, this exposition of judicial power at the beginning of the nineteenth century appears to be a fortunate incident, though the power was not used again till 1857 in the Dred Scott case. In that case too, the Court disclaimed jurisdiction and nevertheless, under political pressure, declared an act void unnecessarily. Perhaps the student of constitutional history will reach the conclusion that the power was not really needed or was not of critical importance till the Civil Rights Cases (1883). Withal, in appraising the Marbury case, we need to remember what appears commonly forgotten, viz. that the state courts had in various cases before 1803 announced and acted on their right to pass an act into disuse—to use the phrase of James Otis in the famous Writs of Assistance case of 1761. The state judges had fully explained the basis of their authority and the principles involved. This authority of the state courts, as everybody knows, has been constantly used and has been exceedingly influential for a century and a half. Fur-

4. One of these cases, U. S. v. Judge Lawrence, may be considered as coming within the appellate jurisdiction of the court. 3 Dallas, 42 (1795).

5. It is said by Chief Justice in a note appended to the opinion in U. S. v. Ferreira (13 How. 40, 53) "in the early days of the Government, the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided *Todd's case.*" (1794)

thermore, the duty of the state courts to uphold the Federal Constitution and laws, a duty reinforced by the Supreme Court in accord with the 25th section of the Judiciary Act of 1789, was the matter of supreme importance in the great task of maintaining a composite republic based on law.

STARE DECISIS—CONTINUED*

By Herman Oliphant

Professor of Law, Columbia University; President Association American Law Schools, 1927

The Essence of Stare Decisis and of a Science of Law

BUT there is a constant factor in the cases which is susceptible of sound and satisfying study. The predictable element in it all is what courts have done in response to the stimuli of the facts of the concrete cases before them. Not the judges' opinions, but which way they decide cases will be the dominant subject matter of any truly scientific study of law. This is the field for scholarly work worthy of best talents because the work to be done is not the study of vague and shifting rationalizations but the study of such tough things as the accumulated wisdom of men taught by immediate experience in contemporary life,—the battered experiences of judges among brutal facts. The response of their intuition of experience to the stimulus of human situations is the subject-matter having that constancy and objectivity necessary for truly scientific study. When we pin our attention to this, we may more freely criticize what courts have said but we shall more cautiously criticize what they have done realizing, as we shall, that they were exposed to the impact of more of the facts than we.

This surer thing for scholarly purpose is also the inner secret of what is soundest in the enfeebled *stare decisis* in judicial government of today. With eyes cleared of the old and broad abstractions which curtain our vision, we come to recognize more and more the eminent good sense in what courts are wont to do about disputes before them. Judges are men and men respond to human situations. When the facts stimulating them to the action taken are studied from a particular and current point of view, which our present classification prevents, we acquire a new faith in *stare decisis*. From this viewpoint we see that courts are dominantly coerced, not by the essays of their predecessors[5] but by a surer thing,—by an intuition of fitness of solution to problem,—and a renewed confidence in judicial government is engendered. To state the matter more concretely, the decision of a particular case by a thoughtful scholar is to be preferred to that by a poorly trained judge, but the decision of such a judge in a particular case is infinitely to be preferred to a decision of it preordained by some broad "principle" laid down by the scholar when this and a host of other concrete cases had never even occurred to him.

One sampling of this proposed subject-matter of a real science of law must suffice. There are two lines of old cases involving the validity of promises not to compete. They are considered in square conflict. But when the opinions are ignored and the facts re-examined all the cases holding the promises invalid are found to be cases of employees' promises not to compete with their employers after a term of employment. Contemporary guild regulations not noticed in the opinions made their holding eminently sound. All the cases[6] holding the promises valid were cases of promises by those selling a business and promising not to compete with the purchasers. Contemporary economic reality made these holdings also eminently sound. This distinction between these two lines of cases is not even hinted at in any of the opinions but the courts' intuition of experience led them to follow it with amazing sureness and the law resulting fitted life. That is a sample of the stuff capable of scientific study.

How the Ground Lost May Be Regained

Because our law students are to be the scholars, advocates, counselors, and judges of tomorrow, their training is the area of supreme strategic importance in this whole situation. That is our opportunity and responsibility. Regaining the values lost to judical government by the retreat from *stare decisis* and making law more a science of realities and less a theology of doctrines require a radical reorganization of legal education. The remainder of this discussion will be devoted to three large undertakings considered basic for any such reorganization.

Study of the Social Structure Needed

Law teachers should have and law students should get either before or after they come to the law school a comprehensive knowledge of the whole social structure. This should not consist of theories as to domestic, economic and political life nor of unrelated description of disjoined social phenomona. The whole life which law affects should be viewed comprehensively as an interrelation of processes. This understanding cannot be got today by a hit and miss apprenticeship in life any more than living in our bodies can teach us its structure and functioning. Systematized study, deliberately focused toward getting an adequate knowledge of the entire social structure as a functioning and changing but coherent mechanism, is a basic prerequisite.

Only by such organized and thorough study can we get an understanding of social reality equal to that of the judges and scholars who merely grew up in the earlier and simpler social environment. The realism of *stare decisis* cannot equal its realism in that earlier time until that knowledge is brought to bear in deciding cases. Something more than the layman's knowl-

*Continued from February issue. Presidential Address delivered at Annual Meeting of Association of American Law Schools held at Chicago, December 29, 30 and 31, 1927.

5. The thesis is that facts are the only stimuli capable of scientific study as a basis of prediction. Prior rationalizations are rejected *for this purpose* because the facts prevail when they diverge from the prior generalizations and for each rationalization indicating one result, a contradictory one indicating the oposite result can usually be found. The utility of prior rationalizations in the study of judicial forensics is not being discussed at this time.

6. In one case it did not appear which situation was involved.

edge of the social structure is not overambitious as a part of the equipment of a legal scholar.

A Reclassification of Law Is Proposed

The second undertaking proposed is a radical reclassification of most of law in terms of the human relations affected by it. The catogories of that reclassification emerge from the suggested study of the whole social structure.

Our procedural set up will not provide this reclassification. Marks of its former fine discrimination are still visible and their significance is not to be neglected. Students of procedure can help in checking the present validity of old procedural groupings and the significance of the new procedural groupings which we are getting from the organization of specialized courts, commissions and administrative agencies. (Such students some times complain that their colleagues attach no importance to procedure except for the light it throws on substantive law. This complaint can hardly convict of sin so long as only a beginning has been made in exhausting the possibilities of that position.)

This task of reclassification cannot be left to the publishers of digests. Judges do not have the leisure or freedom to do it. It is not suited to be done by town meetings of judges, lawyers and scholars. It is the job of the American Law School in its capacity as part of a university.

The double ideal of this new classification should be an ever greater and greater particularity and recency of view. *Stare decisis* has been sapped of much of the spirit of the common law, and legal scholarship approaches an architecture of castles in the thin air of pure theory because of the breadth and antiquation of present groupings of human situations for legal treatment. Such a reclassification will help to send us about our proper business of raising the walls within which men must work and live by just laying one brick upon another, letting a keener awareness of the needs of the life and labor which they are to house guide our hands.

No reclassification can get us as near to a case as the judge who decides it, yet, about it lies a considerable field across which its currents can be felt. Each human situation has many aspects, yet somewhere in its field are points of opposite polarity charged with human concern. It is between these poles that the currents of our time flow and these currents are the prime stimuli of nonvocal judicial behavior. Our classification should bring us close to them for truly scientific observation.

We cannot come close to them without leaving many of our present remote points of view and without abandoning many present groupings of material which are sterile except for logical purposes and often confusing even for those. In our present classification, problems of getting laws observed, *i. e.*, problems of law administration, are intermingled with problems as to what conduct is desired. The illegality of a contract of sale, though raising a question as to the use of the disability to sue on the contract as an indirect deterrent of the illegal conduct in question, is treated as one of substantive law and discussed in terms of some such barren and ambiguous abstraction as title. These two widely different kinds of questions are now confused because we have only two groupings, substantive law and adjective law, the latter being too narrow to embrace broad areas of law administration. Human relations as diverse as political relations, familial relations, and business relations are hopelessly mixed and confused in such broad and outworn categories as property, trusts, torts, and contracts. Problems as to leaseholds of dwellings and of railroads are grouped together so that practical differences are obscured. A contract to marry is grouped with a speculative contract to purchase stocks and their differences considered as relatively minor. Again, in those areas where only political relations are treated, no consistent grouping and subgrouping of greater current significance are attempted. Constitutional law embraces categories with wide practical divergencies because the exigencies and accidents of post revolutionary government happened to get them mentioned in a single document. Where we segregate a fraction of familial relations and call it domestic relations, the subgrouping is in terms of such nonfunctional concepts as contract, property, and tort. When chance brings some business problem together for treatment, as happens in sales, divergent questions as to marketing, finance, and risk are confused under such labels as "passage of title."

Practical Attitude and Objective Methods Are Needed

These two undertakings, *viz.*, a study of the social structure and a reclassification of the law in the light of that study would accomplish the return to *stare decisis* proposed. But are we not ready to plan for more? There is a third undertaking which will improve on the hard practicability of *stare decisis* of earlier times. For us to attempt some improvement in some centuries cannot seem precipitate. And this further undertaking is necessary if we are to begin to build a science of law by exploiting non-vocal judicial behavior. In recent times the world of scientific thought has been turning dark places into light. We now can see that the choice between the legal principles competing to control the new human situations involved in the cases we pass upon is not dictated by logic. Neither deduction nor induction can do more than suggest the competing analogies and to indicate promising directions for trial and error testing. Neither the astuteness of legal scholarship nor the authority of judicial position can transcend these limitations inherent in logic. The final choice of analogy can be made only in reliance upon practical considerations or upon pure chance. Rejecting sheer guess as a basis of sound judicial action and of worthwhile scholarship, then discovering and marshalling decisive practical considerations inevitably constitute the essence of both an improved judicial process and of a more useful scholarly effort. A return to the sounder empiricism of *stare decisis* of former times should reckon with the recent advances in scientific thought referred to. That ancient empiricism was intuitive. It worked well because judges sat close to problems and viewed them as current problems. It would have worked better still had it been conscious and methodical. Remembering always that the final choice for both judge and scholar in deciding a case or criticizing a decision is always a practical one, whether consciously or unconsciously so, the problem, how a more conscious and methodical process can be substituted for an intuitive empiricism in making that choice, transcends in importance all other problems of legal education. Until its solution is attempted, a socialized jurisprudence will continue a mere aspiration and social engineering will be the profession of many but the occupation of none.

The Nature of the Problem

An examination of some of the presuppositions of intuitive empiricism as a method of deciding cases and evaluating decisions may shed some light on the solution of that problem. Good as it has been, it assumes

that we know social reality and shape our actions to it merely because we live in it. It presupposes that the affairs of life cannot be more wisely controlled than by men of affairs. But none of us knows social reality merely because we live in it. The experience of any man, however broad, is limited largely to one period of time. The future he cannot know and the past is reported to him by men of equally limited experience. The social experience of most of us is limited largely to one people, yet social reality encircles the globe. Our social experience is limited to one class of people though we must govern all classes. Indeed, it is limited to but one occupation and the part often most decisive in determining our attitudes is the experience of but a single family group. Complete reliance upon an intuition of fitness of solution to problems was better placed when used in the solution of the legal problems emerging from the simpler life of early England. Some parts of current social life are no more complex now than then, but great areas of it—and the areas of most frequent dispute—are most complex, being knit together by a social and mechanical technology which only experts can hope to understand. Complete reliance upon an intuition of such a limited experience is a policy of doubtful wisdom.

But more can be said. If our individual experience were as broad as the life whose problems we work on, still our intuition of experience would be no certain guide. Not all of our experience goes to make up that intuition. Individual temperament and our self-interest cause us, in the most subjective fashion, to select from the totality of our experience that which satisfies our temperament, and fortifies our interest. Thus but a small fraction of total social reality forms our attitudes and grounds our intuition of experience. To distill a guide from so little of the immense and complex social reality about us is a procedure for which the modern scientific thought must offer some better substitute. Such an unconscious empiricism, such a common-sense pragmatism can be improved upon by borrowings from the accumulated wisdom of the sciences.

Making that improvement is a problem first of attitude and second of method.

Attitude Toward Matters of Method

The attitude required is complete and constant self-consciousness as to methods of thought and procedure. That means an active awareness that these matters are not solely the concern of the philosophical theory of a few, but are things of immediate practical importance to all in day to day observation and thinking. The required attitude involves keeping in the forefront of the mind a complete understanding of the limitations and dangers of deduction, of over-generalized induction, and of common-sense pragmatism. If in our return toward *stare decisis* we could do no more than attain this attitude, the gain would be tremendous. If as law teachers we could do no more than to make students and, through them, lawyers and judges realize that judgments on new questions must, in the last analysis, be either fortuitous or practical, and to realize the perils of an unconscious empiricism in complex situations, that would be taking a long step forward. Much is accomplished by having merely the consciousness that there resides in the human mind no benevolent predestination of logical necessity and no intuition of universal experiences to shape our solutions of the practical problems of law in life. That consciousness alone induces an attitude of wholesome caution and fruitful eagerness more carefully to weigh the little objective evidence at hand.

Projects Relating to Objective Methods

The third undertaking envisages not merely a conscious empiricism, but also a methodical one. Our minds permeated with the attitude just described and oriented by a comprehensive knowledge of the makeup and operation of the whole social structure should begin the quest for greater objectivity in methods employed in study and decision. So far as may be, the operation of *stare decisis* in deciding cases and our evaluation of decisions should be impersonalized by the use of methods of marshalling and judging practical considerations which have as great a degree of objectivity as may be.

Under the head of finding and using objective methods, two large projects stand out:

Our case material is a gold mine for scientific work. It has not been scientifically exploited. The science of mechanics was built up by experimentation, but geology, for example, has had to rely almost solely upon observation. In law we cannot institute suits to test judicial behavior, as the physicists make experiments to test the behavior of matter. But each case is a record of judicial behavior. And there is a wealth of such records equaling that to which geology, for instance, has had access and the individual records are not more fractional or otherwise imperfect. A sufficient number of recorded experiments, all of whose factors are not known but with the unknown factors varying, may be quite as illuminating as a limited number of controlled experiments. Why has not our study of cases in the past yielded the results now sought? The attempt has been made to show that this is largely due to the fact that we have focused our attention too largely on the *vocal behavior* of judges in deciding cases. A study with more stress on their *non-vocal behavior, i. e.*, what the judges actually do when stimulated by the facts of the case before them, is the approach indispensable to exploiting scientifically the wealth of material in the cases. Economists may well congratulate themselves that they have the statistical method to add objectivity to their results. The case method when used scientifically will be found to be a method fully as significant for law as statistics is for economics. It is outstanding as an objective method.

The second project is this: We should critically examine all the methods now used in any of the social sciences and having any useful degree of objectivity. Their possibilities for law should be studied and their use attempted.

General Considerations as to Methods

In this connection, two general considerations should be kept in mind. It is common for those despairing of the widespread application of scientific methods in legal study to assume that a method having the objectivity and precision of that of mathematical physics is prerequisite in order for us to have any scientific method in the study of law. Reflection reveals that objective methods having great utility in such areas as biology and geology differ widely from the methods of mathematical physics with respect to their precision and objectivity.

The word "objective" in the term "objective method" is itself pragmatic. A very gross measurement of an object may be sufficiently accurate for the purposes of a rough carpenter and hence for his purposes "true" while hopelessly inaccurate for the purposes of a physicist working upon the expansion coefficient of a metal. The personal equation and sub-

jective elements bulk large in the first measurement, but for the purposes of a carpenter, they are unimportant. They are, of course, present in the measurements of a physicist. All that he can hope to do is reduce them to a minimum, and how far he needs to reduce them depends upon the particular purpose for which he is making a particular measurement. When this fact is fully appreciated by legal scholarship its hope for truly scientific methods may be found to be nearer to realization than it is now thought to be. Other social scientists are certainly making substantial progress in developing objective methods in many of their fields.

Conclusion

Such is the double task before us: first to work out a truly contemporary and detailed reclassification of human situations for legal treatment; and second, to develop that understanding of the social structure which will make possible a gradual return to that particularity of problem and awareness of reality which will make the opportunism of *stare decisis* an effective and enlightened tool for ordering human affairs; thus inaugurating a return to *stare decisis*, that greatest contribution of our common law and of our people to the art of human government; to *stare decisis*, a doctrine all of whose political wisdom cannot be caught into a sentence, but whose spirit, thoughtful about consequences, is cautious to consider only immediate problems and careful to illuminate them from the glow of the prudence and insight which its own experimentation patiently forges. To those high aims should be added the yet higher one of improving on the intuitive prudence of *stare decisis* by inaugurating a methodical empiricism.

Those are the tasks and that the call,—such a return to *stare decisis*. Pride of authorship should not hamper nor institutional jealousies retard. Many experiments should be made. One new classification should be tried in one place while some new methods of research are being tested elsewhere.

The most vital thing which this Association could set itself to do during the next decade is to serve as a stimulus to such widespread experimentation, as a clearing house for its results, and a forum for their discussion.

A return to a more rigorous and enlightened empiricism in the study and making of law is our most urgent need. We must work our way toward it. There is no short and certain way. It means to leave the Egypt of easy abstraction and generality and to face again the hardships of uncharted paths into the desert. Those marches already beginning will be many and trying. While those of riper years help with sympathy and understanding, younger shoulders must carry most of the loads. If we could but make something of a common task of these great labors, we might well hope soon to reach much of the promise of this common good.

Trade Association Statistics

(Continued from page 138)

deciding cases upon the "particular facts,"[68] where the essential purposes of the law are not defeated. The social interest in the protection against fraudulent practices justified, in the Cement case, the policy there considered.

Perhaps, a regard for completeness compels that reference should not be omitted, that, in practice, there are certain elements of hazard present in the operation of a trade association reporting plan. An unwise expression by an officer or committeeman of the association, a few selected letters or remarks by the secretary, or any other representative officer, especially in a period of rising prices, or where there is a substantial uniformity of price levels, may be deemed, in the eyes of a prosecuting officer, sufficient evidence from which a jury could draw the conclusion that a conspiracy in violation of the anti-trust laws exists. This danger, it should be said, is present in every case where the question of legality must be inferred after protracted proceedings and voluminous oral and written testimony.

Further, the responsibility imposed upon trade association members by the liberality and breadth of the Maple Flooring and Cement decisions must be recognized, so that when competitors meet informally and frequently, the always-present possibility of an expressed or implied concerted arrangement as to future prices or production policy, must be avoided.

From the point of view of court proceedings, an important rule seems to have been announced in the Maple Flooring and Cement cases, to the effect that mere stability, and even substantial uniformity of prices, arising from the operation of economic laws and not from artificial agreements among the members, are not, in and of itself, evidence of a conspiracy to violate the law.

Therefore, when the defendants offer evidence tending to show that the trend of prices correspond to the law of supply and demand, and are fair and reasonable, and the prices of the commodities of members are not higher than prices of other commodities in general, the legal position of the defendant, under this ruling, is made substantially stronger. It is, at any rate, a different legal inference than that relied on in the Hardwood case on page 399, where the court refers to the "disposition of men 'to follow their most intelligent competitors' especially when powerful; by the inherent disposition to make all the money possible, joined with the steady cultivation of 'harmony' of action," as a consideration in trade association practices.

This shift toward a more agreeable attitude toward trade association activity was recognized by the Supreme Court in the International Harvester case.[69]

> "And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination. United States v. United States Steel Corp. supra, 448. And see Cement Mfg. Protective Asso. v. U. S., 268 U. S. 588, 606."

While it is true that the Court did not in this case have under review the activities of a trade association, nevertheless it relies, in part, for its authority, upon a decision in a trade association case. Thus, the mere fact that a price change is announced by one member and is followed by others in the trade does not necessarily establish the presence of an unlawful agreement. Lawyers who have had experience with the enforcement of the anti-trust laws and practice in these cases have recognized how vital is this distinction, in the inferences to be drawn from such a state of facts.

In its practical operation, an inherent infirmity of statistical reporting, by no means reducible to an easy solution, must be thoughtfully and seriously considered.

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68. A precedent can be found upon the facts adjudicated in National Association of Window Glass Mfrs. v. United States, 263 U. S. 403, 411, 412. (1923)

69. Sanford, J., in United States v. International Harvester Company et al., decided June 6, 1927. 71 L. ed. 852, 858.

To insure the practical efficiency of a reporting plan and yet remain within the legal limits, without terminating in an implied or express agreement among the association membership as to a joint production or price policy, is a question upon which future development of this phase of anti-trust work will, in large measure, depend.

In the absence of penalties, undue supervision, or group pressure, which the policy of the law prohibits, a practical remedy must be discovered, without exceeding legal bounds, to prevent a member from taking advantage of the situation disclosed by the statistical reports. The plan may show an excess of production in relation to orders or shipments, and wise policy on the part of each individual, acting alone, might indicate advisability of curtailing his own production schedule or the adherence to a price list without lowering his selling price.[70] But heavy overhead expenses and fixed obligations might, even in the absence of malevolence, compel him to continue to produce at full capacity or sell at lower than the market price to obtain income for his needs.

This difficulty must be stated and reflected upon with candor. It would seem that only an unselfish appreciation of the welfare of the entire industry can eradicate a policy on the part of an individual, who will so take advantage of the industrial situation. Only in the raising of standards of trade morality, a movement which in its broadest aspect is one of the notable achievements in the field of trade relations of the past few decades, can this problem be adequately solved to the satisfaction of a firm legal policy, forbidding agreements to limit production or to fix or maintain prices. This eminently practical situation must await the constructive thought of business genius, and a helpful spirit by government administrative officers.

"It behooves government officials to come to a full realization of the fact that it is a mistaken public policy, and is also utterly futile, for them to attempt the task of forcing business men to compete in ignorance and secrecy. Our hope for improving competitive conditions lies, not in forcing business men to conduct their business like moles, but in giving them all the enlightenment possible as to the factors that influence the competitive situation. The open price movement has no doubt sprung into existence in response to the growing desire of business men to govern their business operations intelligently in the light of existing business conditions."[71]

With a mutual appreciation by business men of the settled policy of the law, and by the courts of the difficulties and necessities of modern business, trade association statistical reporting plans confidently look to a further development.

New York City.

70. *Cf.* Nelson, Effect of Open Price Association Activities on Competition and Prices, American Economic Review, Vol. XIII, June, 1923, 269.

71. *Ibid* 274.

OPINIONS OF THE INTERNATIONAL COURT

A Department for Reviews of the Judgments and Opinions of the Permanent Court of International Justice

By Manley O. Hudson

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Fourteenth Advisory Opinion of the Permanent Court of International Justice[1]—Jurisdiction of the European Commission of the Danube Between Galatz and Braila

The European Commission of the Danube has the same powers over that part of the Danube from Galatz to Braila, including the port of Braila, as over lower portions, and its powers over the whole of the maritime Danube are divided from those of the Roumanian authorities by criteria of navigation and the obligation to ensure freedom of navigation and equal treatment of all flags.

The request for this opinion was made by the Council of the League of Nations on December 9, 1926. The Council made this request at the instance of the Governments of France, Great Britain, Italy and Roumania, which had joined in an agreement on September 18, 1926 for taking such action. The Council's request was communicated by the Registrar to all members of the League of Nations and to all states entitled to appear before the Court. Memorials were filed with the registry by the British, French and Roumanian governments, and replies or counter-memorials were filed by the British, Italian and Roumanian governments. All four governments were represented at the oral hearings held in October, and the opinion was handed down on December 8, 1927.

The jurisdiction of the European Commission of the Danube, established in 1856, has long been in dispute. A treaty of March 10, 1883 purported to extend the jurisdiction from Galatz to Braila, but Roumania was not a party to this treaty. However, "a sort of unwritten *modus vivendi* which was based on the circumstances" was applied, and powers were exercised by the European Commission over the upper sector. Various efforts were made to clear up the uncertainty. After the war, the Treaty of Versailles set up a new International Commission to deal with upper Danube questions, and a Statute of the Danube was drawn up in 1921 and later put into force; but neither of these documents cleared up the question as to the powers of the older European Commission, referring always to the *status quo ante*. Nor did various discussions in the European Commission itself result in agreement. In 1924, at the request of the British Government the dispute was put on the agenda of the Advisory and Technical Committee for Communications and Transit of the League of Nations, and a special committee of enquiry which was constituted made an elaborate investigation and reported on July 2, 1925, with a series of

1. Reported in Publications of the Court, Series B, No. 14.

conciliation proposals. Thereafter, the Advisory and Technical Committee for Communications and Transit expressed the opinion, in conformity with the conclusions of the special committee's report, that "the jurisdiction of the European Commission of the Danube extends from Galatz to above Braila under the same conditions as from the sea to Galatz." Various conferences were later held, in the course of which the Roumanian delegate stated that his Government rejected the proposal to bring the matter to the Court for judgment. At the conclusion of these conferences, the agreement of September 18, 1926, was signed.

The first question submitted to the Court was:

"Under the law at present in force, has the European Commission of the Danube the same powers on the maritime sector of the Danube from Galatz to Braila as on the sector below Galatz? If it has not the same powers, does it possess powers of any kind? If so, what are these powers? How far upstream do they extend?

An investigation of the "law at present in force" led the Court to examine the net-work of treaties relating to the Danube. The latest of these is the Convention establishing the Definitive Statute of July 23, 1921, which evinces an intention that the jurisdiction of the two commissions of the Danube should leave no sector between them uncovered. It also describes the European Commission as having jurisdiction "under the same conditions as before and without any modification of its existing limits." The Court refused to say that the Definitive Statute had perpetuated the divergence of views, and found it "quite reasonable to suppose that the controversy was settled on the basis of the *status quo ante bellum*." This view was based upon "the language employed in the Statute and on the historical facts upon which it rests, without any reference to preliminary discussions or drafts."

The Roumanian Government contended that between Galatz and Braila the European Commission had only "technical powers" as distinguished from "juridical powers." It relied on texts used in the preparation of the Definitive Statute and the relevant articles of the Treaty of Versailles—the Court refused to consider the latter on account of their confidential character; but these were considered insufficient to base the contention. It was admitted that Roumania had participated in the promulgation of regulations conferring powers upon the European Commission between Galatz and Braila, and that certain powers had been exercised by the Commission. If the exercise was only tolerated before the war, toleration implying a negation of rights, the "practice has now been converted into a legal right by Article 6 of the Definitive Statute." An analysis of numerous treaties failed to reveal support for the Roumanian view, nor were the powers exercised by the European Commission in fact limited to what the Roumanians called "technical powers." On this, the Court accepted the findings of the special committee of enquiry which reported in 1925, to the effect that "from 1883 to 1899, and from 1904 to 1914, 63 cases had been adjudicated by the authorities of the European Commission." (Five more cases were pointed out by the Italian representative before the Court.) Comparing the powers exercised by the European Commission above Galatz with those exercised below Galatz, the Court found that the former "cover practically the same ground." Hence its conclusion that "under the law at present in force, the Commission has the same powers on these two sectors of the maritime Danube"; and it placed the "upstream limit" of the higher sector immediately above the port of Braila, on the principle that "freedom of navigation upon a river must include navigation as far as the zone to be reached."

The second question submitted to the Court was, *inter alia*, whether the powers possessed by the European Commission on the Galatz-Braila sector, if any, "extend over one or more zones, territorially defined and corresponding to all or part of the navigable channel, to the exclusion of other zones territorially defined and corresponding to harbor zones subject to the exclusive competence of the Roumanian authorities?" The Court thought that "the pre-war situation of fact must be considered as maintained, even in so far as concerns the ports of Galatz and Braila." Since the European Commission is entrusted with ensuring "the free movement of vessels on the maritime Danube," it would be "inconceivable" that its territorial jurisdiction "should be interrupted by port sectors exclusively subject to the territorial authorities." No such "dismemberment" of the river has been effected by the treaties. Nor is any distinction to be drawn between the river surface and the land surface. Hence the Court concluded that "as regards the ports in question, the dividing line between the respective competences of the European Commission and the Roumanian authorities is of a non-territorial nature." Searching then for non-territorial criteria, the Court adopted those (i) of navigation, the Commission being competent in regard to navigation in ports, whether the ships are passing through or coming to or leaving their moorings, and (ii) of the obligation to ensure freedom of navigation and equal treatment of all flags, the Commission being competent as concerns the ports to exercise the supervision inherent in this obligation.

In view of these answers, it became unnecessary for the Court to deal with the third question. Judges Nyholm and Moore delivered separate concurring opinions, while Deputy-Judge Negulesco dissented.

Eleventh Judgment of the Permanent Court of International Justice[2]—Interpretation of Judgments Nos. 7 and 8 concerning the Case of the Factory at Chorzow

By a previous decision of the Court, having the force of res judicata, the ownership of the factory at Chorzow had been determined, without reservation to the Polish Government of any right to ask by process of law for any new determination of that question.

In its seventh judgment, of May 25, 1926, the Court had declared that the Polish Government's attitude toward a German company, the *Oberschlesische Stickstoffwerke*, as owner of a certain landed property at Chorzow, was not in conformity with a treaty between Germany and Poland, signed at Geneva, May 15, 1922. Thereafter, the two governments attempted to negotiate a friendly arrangement for payment of pecuniary compensation for the injury done to this company. Such negotiations did not prove fruitful, however, and on February 8, 1927, the German Government again had resort to the Court, submitting that the Polish Government was under an obligation to make reparation. The Polish Government disputed the Court's jurisdiction, but in the Court's eighth judgment, of July 26, 1927, the jurisdiction was affirmed and the second German case reserved for judgment on the merits. The case is still pending.

Meanwhile, on October 18, 1927, the German Government informed the Court, in a new application, that the Polish Government had on September 16, 1927,

2. See Publications of the Court, Series A, No. 13.

begun proceedings in a Polish District Court at Kattowitz, against the *Oberschlesische*, with a view to having it declared that the latter had not been owner of the property at Chorzow, but that this property had been owned by the German Reich to which the Polish Treasury had succeeded. This action of the Polish Government had been taken in avail of the possibility claimed to have been reserved to it by the Permanent Court of International Justice. The German Government now contends that this position of the Polish Government is not in accordance with the true construction of Judgments Nos. 7 and 8.

Arguments on behalf of the two governments were heard on November 28, 1927, and judgment was given on December 16, 1927. The Court is bound by Article 60 of its Statute to give a construction of a judgment "upon the request of any party," if there is a "dispute as to the meaning or scope of the judgment." The Polish Government denied that such a dispute existed. The Court was therefore called upon to define the terms "dispute" and "meaning or scope of the judgment." The existence of a dispute does not have to be manifested by diplomatic negotiations. Indeed, no formal manifestation is necessary. It is sufficient that "the two Governments have in fact shown themselves as holding opposite views in regard to the meaning or scope of a judgment," that is as to "those points in the judgment in question which have been decided with binding force." After reviewing the facts, the Court had no doubt that such a dispute did exist.

On the merits, the Court found that the German Government sought a construction, as to meaning and scope, of a passage in Judgment No. 7, as follows: "If Poland wishes to dispute the validity of this entry in the land register, it can, in any case, only be annulled in pursuance of a decision given by a competent tribunal." It held that these lines were to be "regarded as containing an additional argument, drawn from generally accepted international law," for its conclusion that the *Oberschlesische's* ownership of the Chorzow factory was established. It was not a reservation making the binding effect of the judgment given dependent on later court proceedings. Judgment No. 7 was a declaratory judgment "the intention of which is to ensure recognition of a situation at law, once and for all." It was therefore held that no right of asking by process for a declaration such as was sought by the Polish Government in the court at Kattowitz, had been reserved, but that on the contrary the Court had meant to recognize, with binding effect between the parties concerned and in respect to that particular case, amongst other things, the right of ownership of the *Oberschlesische Stickstoffwerke A.-G.* in the Chorzow factory under municipal law.

Judge Anzilotti dissented from this judgment, being opposed to giving any judgment of construction on the facts of this case.

TOUR TRAINS TO THE SEATTLE MEETING

SUPPLEMENTING its announcement in the February Journal, the Committee on Arrangements and Transportation for the Seattle Meeting announces the schedules and rates for the Tour Trains as follows:

Tour A

Lv. Chicago, C. M. St. P. & P., 10:00 A. M., Monday, July 16.

One hour at Williston, N. D., on Tuesday afternoon for exercise.

Ar. Glacier, Grt. Nor., 6:30 A. M., Wednesday, July 18.

Motor and boat trip through Glacier Park and the adjoining Waterton Lake Park in Canada. One night at Many Glacier Hotel. One night at Prince of Wales Hotel in Canada. Tickets for this trip include transportation, seven meals and hotels for two nights.

Lv. Glacier, Grt. Nor., 6:30 P. M., Friday, July 20.

Ar. Seattle, Grt. Nor., 6:30 A. M., Saturday, July 21.

Entire evening in Seattle, the trains leaving from C. M. St. P. & P. depot about midnight for Rainier Park.

Ar. Ashford (entrance to Rainier Park), 4:30 A. M. Sunday, July 22

Autos leave Ashford 8:15 A. M., arriving Paradise Valley 10:00 A. M. Returning leave Paradise Valley 5:15 P. M. Tickets include autos and luncheon at Paradise Inn.

Ar. Seattle, C. M. St. P. & P., 9:30 P. M., Sunday, July 22.

Various optional trips at Seattle are included in tickets, including a boat trip to Victoria and Vancouver. Boats leave Can. Pac. docks at 9:00 A. M. and returning arrive at 9:00 P. M. A one day round trip to Victoria allows three hours there but if the trip is extended to Vancouver it requires a day each way. Details of the optional motor trips will be published later.

Lv. Seattle, Un. Pac., after the Annual Dinner, Friday, July 27.

Trains will leave about 2:00 A. M. Saturday morning, giving ample time for changing clothes, packing and transfer of trunks after dinner.

Ar. Portland, Un. Pac., 8:30 A. M., Saturday, July 28.

All day auto trip around the base of Mt. Hood, returning by Columbia River Highway. Tickets include trip and baked salmon luncheon.

Lv. Portland, So. Pac., 5:00 P. M., Saturday, July 28.

Ar. Oakland Pier (Ferry) 5:35 P. M., Sunday, July 29.

Ar. San Francisco (Market St. Ferry) 6:00 P. M., Sunday, July 29.

From Oakland the trains will be sent around to the So. Pac. depot at Third and Townsend Sts. where they will be available after 10:30 P. M. Sunday evening for those who do not wish to go to a hotel. Those preferring to go around the bay with the train may do so but any dinners desired should be arranged in advance. Details of the San Francisco entertainment will be published later but will include a motor trip for which the tickets will provide.

Lv. San Francisco, So. Pac., 1:30 A. M., Tuesday, July 31.

Arrive Del Monte, So. Pac., 5:00 A. M. Tuesday, July 31.

Tickets include motor trip around Monterey Bay by way of Pacific Grove, Pebble Beach, Carmel and the Scenic Blvd.

Lv. Del Monte, So. Pac., 6:30 P. M., Tuesday, July 31.

Ar. San Diego, A. T. & S. F., 10:00 A. M., Wednesday, Aug. 1.

Auto to Coronado Beach Hotel. Auto trips to Balboa Park and Tia Juana during the afternoon. Tickets include all motor trips. The trains will be kept at San Diego overnight for the occupancy of those who prefer them but will be sent to Los Angeles Thursday morning so that the baggage may be unloaded and awaiting members at their hotels.

Lv. Coronado Beach Hotel by auto, 10:00 A. M., Thursday, Aug. 2.

Stop at La Jolla for luncheon and to see the caves. Route via San Juan Capistrano mission, Laguna, the Seal Beach oil fields and Long Beach. Tickets include transportation and luncheon.

Ar. Los Angeles by auto, 6:00 P. M., Thursday, Aug. 2.

Details of the four days of entertainment in and around Los Angeles will be published later. Friday will be given to a boat trip to Catalina Island with a trip in a glass bottom boat while there and luncheon at

the St. Catherine Hotel. Motor trips through Pasadena, Glendale, Hollywood, Beverly and Santa Monica are planned. Tickets include all expenses connected with the foregoing trips.

Lv. Los Angeles, Un. Pac., 1:00 P. M., Monday, Aug. 6.
Ar. Cedar City, Un. Pac., 7:00 A. M., Tuesday, Aug. 7.

By auto Tuesday morning to Zion Canyon remaining at Zion Lodge over Tuesday night. On Wednesday by auto through Kaibab Forest to the Grand Canyon. Wednesday and Thursday nights at Grand Canyon Lodge. On Friday by auto to Bryce Canyon remaining at Bryce Lodge over night. Saturday afternoon by auto to Cedar City with a stop at Cedar Brakes. Dinner at El Escalante Hotel, Cedar City. Tickets include transportation, fourteen meals and four nights lodging.

Ar. Cedar City, Un. Pac., 9:00 P. M., Saturday, Aug. 11.
Ar. Salt Lake City, Un. Pac., 6:00 A. M., Sunday, Aug. 12.

Tickets include auto trip Sunday morning. Farewell luncheon at the Salt Lake Hotel.

Lv. Salt Lake City, Un. Pac., 2:00 P. M., Sunday, Aug. 12.
Ar. Chicago, C. B. & Q., 8:00 A. M., Tuesday, Aug. 14.

Tour B

The same as Tour A, except that it omits Glacier and gives only three days in Seattle.

Lv. Chicago, C. M. St. P. & P., 10:30 A. M., Saturday, July 21.
Ar. Seattle, Grt. Nor., 7:30 A. M. Tuesday, July 24.
Lv. Seattle with Tour A, after the Annual Dinner, Friday, July 28.

Tour C

The same as Tour A except that it omits Glacier on the outbound trip and California on the return trip and gives only three days in Seattle.

Lv. Chicago, C. M. St. P. & P., 10:30 A. M., Saturday, July 21.
Ar. Seattle, Grt. Nor., 7:30 A. M., Tuesday, July 24.
Lv. Seattle, Un. Pac., after the Annual Dinner, Friday, July 28.

Train leaves about 2:00 A. M., Saturday, giving time to change clothes, pack and transfer trunks.

Ar. Portland, Un. Pac., 8:30 A. M., Saturday, July 29.

All-day auto trip around the base of Mt. Hood, returning by the Columbia River Highway. Tickets include trip and luncheon.

Lv. Portland, Un. Pac., P. M., Saturday, July 29.
Ar. Cedar City, Un. Pac., 7:00 A. M. Monday, July 30.

Auto to Zion Canyon remaining at Zion Lodge over Monday night. By auto Tuesday through Kaibab Forest to the Grand Canyon. Two nights at Grand Canyon Lodge leaving Thursday morning by auto for Bryce Canyon Thursday night at Bryce Lodge. By auto Friday afternoon to Cedar City stopping at Cedar Brakes. Dinner at El Escalante Hotel. Tickets include transportation, fourteen meals and four nights lodging.

Lv. Cedar City, Un. Pac., 9:00 P. M., Friday, Aug. 3.
Ar. Salt Lake City, Un. Pac., 6:00 A. M., Saturday, Aug. 4.
Lv. Salt Lake City, Un. Pac., 2:00 P. M., Saturday, Aug. 4.
Ar. Chicago, C. B. & Q., 8:00 A. M., Monday, Aug. 6.

Those wishing to make the outbound trip with Tour A and return with Tour C may do so by adding $60.00 to the Tour C rate.

RATES

The rates given cover all the transportation and Pullman charges for the entire trip. There will be no extras for the listed side trips. Coupon tickets will be issued covering all side trips and unused coupons will be redeemed. The rates given include hotel expense (meals and rooms) during the five days in Zion. For Tour A they include the same expense during the three days in Glacier. Luncheons on side trips and Pullman tips are also included.

The rates do not include meals or hotels except as stated. The trains may be used in place of hotels at San Francisco and San Diego but hotels are necessary at Seattle and Los Angeles. Meals on trains will be a la carte.

	Tour C	Tour B	Tour A
One in upper berth	$148.00	$200.00	$270.00
One in lower berth	158.00	223.00	295.00
One in section	188.00	272.00	355.00
Two in compartment, per person	183.00	261.00	340.00
Three in drawing room, per person	190.00	274.00	355.00
Two in drawing room, per person	211.00	299.00	385.00

To the above must be added the round-trip railroad fare, which is:

	Tour C	Tour B	Tour A
From Chicago	$104.05	$117.48	$117.48
From Cincinnati	115.10	128.53	128.53
From Washington, D. C.	144.20	157.63	157.63
From New York	152.07	165.50	165.50
From St. Louis	99.35	120.33	120.33
From St. Paul	97.50	110.93	110.93

Railroad rates from other points on application. One way rates, going or returning, will also be quoted so that members who have made different plans may accompany the party one way. Rates for children also quoted on application.

Tour A is recommended for those who can spare the time, as it is the most comprehensive Western tour that has ever been arranged for a large party. Many entertainment features are planned which will be announced later.

It is earnestly requested that reservations be made as soon as possible in order that the Committee may make the necessary arrangements as we will visit many of the coast resorts in the height of their season.

All railroad tickets must be purchased of the Chairman's office in order to secure the proper routing for the various side trips.

For information and reservations apply to Thomas Francis Howe, 7 South Dearborn Street, Chicago, Illinois.

PLAN TO PROMOTE INDUSTRIAL PEACE CONSIDERED

THE Sub-Committee on Federal Industrial Legislation of the Committee on Commerce, presided over by the Chairman, Julius Henry Cohen, held hearings in New York City, February 16th, 17th and 18th in the auditorium of the Association of the Bar of the City of New York to hear the opinions and criticisms of experts of a proposal to legalize agreements to arbitrate labor disputes, which the Committee has formulated after two years study. The hearings were opened by Charles S. Whitman, ex-Governor of New York State and former president of the American Bar Association, under whose administration the present study of arbitration by the Association was commenced. His message carried the hope that out of these hearings would evolve some plan to take the settlement of industrial disputes out of the controversial atmosphere of the courts.

President Silas H. Strawn came from Chicago to attend the hearings. He stressed the fact that the Bar Association, in its policies and activities, endeavors to represent the public and is not at-

tached to any political faction or any other interests. He welcomed these hearings as an opportunity to collect the testimony of experts which would be carefully studied by the Association at its annual meeting in July.

The hearings were attended by the entire Committee on Commerce: Rush C. Butler, Chairman, Julius Henry Cohen, Thomas W. Davis, Arthur M. Geary, and Charles R. Fowler. During the three-day session about 200 persons attended representing various industrial, manufacturing, arbitration and labor associations throughout the United States.

The present study is the sequel to a recommendation by the Committee in 1926 that the federal arbitration law for the settlement of *commercial disputes* be extended to provide in like manner for the settlement of *industrial disputes* which are within the federal jurisdiction. The United States Arbitration Law of February 12, 1925, was originally formulated and sponsored by the American Bar Association. As originally drafted this arbitration bill applied to agreements dealing with industrial controversy as well as commercial controversy. However, upon the protest of the Seamen's Union the bill was amended so that nothing in it should apply to "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." At the present time New York and New Jersey are the only states which have statutes making agreements to arbitrate labor disputes legally enforceable.

The present inquiry of the Committee is to determine whether it is in the public interest to amend the present Federal Arbitration Law so as to include industrial arbitration, and so revert to the original intent of the Bar Association. The Committee presented for discussion at these hearings the following declaration of policy:

"To promote good will between those investing captal, those participating in management and those who render service in industry, and to facilitate the moving of commerce without wasteful interruption of industry, IT IS HEREBY DECLARED TO BE the policy of the United States in the field of interstate and/or foreign commerce (and in so far as it may lawfully do so in the field of intrastate commerce) to promote the peaceful adjustment and prevention of industrial controversy by encouraging the making and maintenance inviolate by responsible organizations of employers and responsible organizations of working men and/or women of contracts for the adjustment of their relations, through negotiation and arbitration, such contracts when freely and voluntarily made to be in all respects lawful and binding and the provisions for settlement of differences by arbitration to be irrevocable and enforceable in the manner hereinafter provided; it is declared to be part of said policy to encourage the peaceable and orderly ascertainment of the true facts in all industrial situations coming within Federal cognizance and thus to promote the use of rational and lawful methods in the settlement of controversies arising out of such industrial situations.

"To that end and with that objective, provision is herein made for the legal effectuation of agreements containing provisions for arbitration and for the establishment of a National Industrial Council constituted as hereinafter provided and having the powers and duties hereinafter enumerated."

During the three days of hearings the Committee heard experts in various fields. The following lawyers, specialists in labor controversies, presented criticisms: Gilbert H. Montague, James A. Emery, David Drechsler, attorney for the New York Clothing Manufacturers' Exchange, Raymond V. Ingersoll, Impartial Chairman in the Dress, Suit and Cloak Industry, and Merwin K. Hart—all members of the New York Bar. Economists and experts in industrial relations who testified were: Royal Meeker, former Secretary of Labor in Pennsylvania, Leifur Magnusson, Director, Washington Branch, International Labor Office, P. W. Martin, International Labor Office, W. Jett Lauck, former Secretary of the National War Labor Board. The development of industrial arbitration in New York was given by Charles L. Bernheimer, Chairman of the Committee on Arbitration of the Chamber of Commerce of the State of New York, and Jacob Billikopf, Permanent Arbitrator for the Clothing Manufacturers. Labor organizations were represented by William Green, President of the American Federation of Labor.

The principle embodied in the Committee's formula, that contracts freely made between employer and employee to arbitrate differences should be enforceable, and regarded on a parity with other contracts was approved by all who presented analyses. Recognizing that the sanctity of contractual obligations has been the cornerstone of modern commerce, all conceded that legalization of agreements to arbitrate industrial disputes will remove an out-worn obstruction in the law, which has already been removed in the field of commercial arbitration. Differences of opinion arose over the strategic question of whether federal legislation along these lines is timely, over the extent to which details of the machinery of arbitration and enforcement of awards should be included in the future drafting of a bill and over the codification of rights in industrial relations.

It was stated that the simplicity and fairness of the principle embraced in the Committee's formula will recommend it to the approval of industry and the public. It was stated that business men tend to favor arbitration because it leads to self-government. The recommendation already expressed by the American Federation of Labor and various industrial groups represents a degree of agreement which at present warrants action. The formula is not limited to arbitration agreements between organized interests, but is equally applicable to agreements entirely within the shop. Mr. David Drechsler, attorney for the Clothing Manufacturers' Exchange, W. Jett Lauck and Charles L. Bernheimer stated that in their experience they had observed that constructive measures for the avoidance of industrial controversy achieve the best results when agreements are made in eras of industrial peace, rather than in times of controversy and depression when ill-advised radical leadership finds ready followers. Never before has there been a better understanding between capital and labor or more constructive effort. General comment has approved the Committee's formula. Mr. Matthew Woll regarded it as the "first rays of sunshine breaking through the fog of existing legal chaos." The *New Republic* said: "This committee might have gone off on some wild-goose chase of compulsory arbitration, or the forcible prevention of strikes. Instead, it sensibly recommends a policy of encouraging contracts between employers and labor organizations which shall provide for negotiation and arbitration." The Christian Science Monitor on February 1st said editorially: "Labor in the United States is much nearer the point now than ever before where it will submit its case to an arbitral tribunal. It has proved its ability to support and defend its claims, and it has learned that there is no conspiracy against it as an institution."

In an editorial entitled "Organizing Industrial Peace," the Brooklyn Daily Eagle said, following the hearings:

"Many industrial agreements now freely entered into contain arbitration clauses. To give legal validity to such contracts, always voluntarily made, should be regarded as nothing more than an earnest of good faith. Such questions as the open or closed shop do not enter into the proposed scheme at all. 'Compulsion' brought about by mutual consent should not disturb those who make contracts with the intent to observe their terms.

"It is perhaps too much to expect the principles underlying the Bar Association formula to be accepted at once, but it is a hopeful sign that it has received so much favorable attention from intelligent labor leaders, employers and citizens who appreciate the need for greater stability in industrial relations."

For these reasons legislation at present is deemed propitious.

The question of whether a federal arbitration law would clash with the Sherman Anti-Trust Law was answered in the negative by Mr. Gilbert H. Montague. In the recent decision in the Photo-Engravers case the collective wage agreement was held to be lawful. If wage agreements are not discriminatory they should not present a problem in this field.

A codification of rules to guide arbitration met with no favor. Although Mr. Lauck at first in a published interview urged this, he modified his view later. Codification introduces rigidity and diminishes the element of voluntary action. Mr. Billikopf and Mr. Ingersoll, both arbitrators in the arbitration system of the New York garment industry, stated that from their experience rules must be determined for each situation. The law in industrial relationships must evolve as the common law evolves, permitting expansion, innovation, and a technique adaptable to changing industrial situations.

The Committee was also advised that the personnel of arbitration boards should be selected in advance of disputes from within the industry. Knowledge in advance of who is to adjust difficulties obviates much opposition. In short, it was brought out in the hearings that self-government by groups discussing their problems in a friendly atmosphere brings about better understanding than the processes of the law itself.

A National Industrial Council was recommended as a fact-finding body. It should be composed of experts who will study problems in various industries and recommend principles of solution, but should not act as a body deciding.

It was the agreement of all that compulsory features must be omitted. Likewise, the devising machinery for enforcement and providing penalties must be left largely to the parties to work out in their own agreements. The arbitration plans of the New York garment manufacturers' associations have functioned successfully without any penalizing provisions. A law which is a declaration of policy along the lines of the Committee's formula will, it is believed, have a wide influence in formulating a public opinion, and encouraging the making of arbitration agreements.

In closing the hearings, the chairman, Mr. Cohen, stated that the Committee is determined to consider each step in its own work most carefully and proceed slowly. It will present its report to the July meeting in Seattle. If a bill is drafted, as a result of these hearings, copies will be sent to members of the Association in advance of the annual meeting.

LETTERS OF INTEREST TO THE PROFESSION

Information Wanted from Lawyers and Boards of Law Examiners

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

The Supreme Court of Pennsylvania has recently handed down an opinion sustaining a rule of the Court of Common Pleas of Delaware County which requires that applicants for admission to the bar of Delaware County should certify that they will open their principal office in Delaware County. The rule applies to all applicants, both those who are first being called to the bar and those who have practiced for some time in other counties. Delaware County is suburban to Philadelphia. The rule has particular application to lawyers whose principal office is in Philadelphia, some of whom reside in Delaware County and some of whom do not. If a similar rule were adopted in all of the other counties of the state, the effect would be to prohibit any lawyer from practicing in more than one county.

Desiring to assemble information on the question of how this problem is regulated in other states, may I, through your columns, inquire of lawyers in other states, especially the Boards of Law Examiners, the following questions:

1. Is the question of admissibility to the bar regulated by statute or by rules of court?

2. If by rules of court, is it regulated by state-wide rules or by county rules?

3. What right has an attorney admitted to practice in the court of last resort to practice in the lower courts, viz.:

(a) Is he ipso facto entitled to practice throughout the state?

(b) Is he *eligible* to practice throughout the state, provided he conforms to local regulations such as registration of his address or proof of good character?

(c) Is he entitled to practice only in the county in which he has his principal office?

(d) Is he entitled to practice in any county in which he has an office, whether or not it is his principal office?

(e) Is he entitled to practice in the county in which he resides, whether or not he has his principal office there?

Feb. 14. ALLEN S. OLMSTED, 2ND,
2301 Packard Building, Philadelphia, Pa.

"States' Rights and National Prohibition"

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

In your review of current legal literature, Mr. Robert E. Speer of New York City has written a criticism of a book entitled "States' Rights and National Prohibition," by Archibald E. Stevenson. Mr. Speer writes that there is no contention today over the theoretical question of the rights of the separate States or their duty to exercise these rights; that the real problem is not one of political theory, but is the practical question of getting the States to do efficiently the things which, because of their inefficiency or neglect, and the greater resources, momentum and organization of the National Government, are easily taken over by the latter.

In other words, in the opinion of Mr. Speer, regardless of the fundamental and inalienable rights for which our forefathers fought; regardless of their solemn guaranty in the Constitution of the United States, which was devised to protect and forever preserve the rights of personal liberty conceived by the sturdy liberty-loving Anglo-Saxon colonists,

who risked their lives and fortunes and shed their blood to write it into the Constitution of the United States, if it shall be found, as a practical matter, that it is necessary to impair or even wipe out any of these rights and obliterate these Constitutional guaranties, in order to enable the Eighteenth Amendment and the Volstead Act to be enforced, then because Prohibition may be better enforced by the National as distinguished from the State Governments, it should be transferred to the National Government.

Mr. Speer further writes that the loss and evil of excessive substitution of National for local action is recognized, but the remedy has not been found, nor does Mr. Stevenson suggest what it might be.

The real question involved by the passage of the Eighteenth Amendment, which became effective solely by the ratification of State Legislatures, and which was never submitted to the people in State conventions, was very fully expounded by the Hon. Edward I. Edwards, United States Senator from New Jersey, in a speech which he delivered at the Hotel Biltmore on November 15th, 1926. Mr. Speer does not seem to even remotely touch upon this question, which is the most momentous issue involved.

I am enclosing a copy of Senator Edwards' speech. I believe if you will publish this speech in your JOURNAL it will enlighten both Mr. Stevenson and Mr. Speer and some of your other readers on a viewpoint of the situation which apparently they have not considered.

EDWARD S. ALEXANDER.

New York City, Jan. 30.

(NOTE: On account of lack of space it is impossible to print Senator Edwards' address, as suggested by our correspondent.—EDITOR.)

"The Bill of Rights and Its Destruction by Alleged Due Process of Law"

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

The argument contained in the "Bill of Rights and Its Destruction by Alleged Due Process of Law," is based upon my interpretation of what actually took place in the American Revolution, in the Framing of the Declaration of Independence, in the planning of the new Federal government and the preparation of a constitution to regulate its functions and the treatises from which I collated my historical data were all authoritative. I may except therefrom, Mr. Charles Warren's treatise, to which I unfortunately did not have access.

I notice that Mr. Warren thinks that there is no evidence whatever that "Article V" was so framed as to provide for two distinct modes of ratification of future amendment to the Constitution and then brushes aside, as a historical error, the reasoning by which I reached that conclusion that there was a differentiation because these amendments might be of two entirely different descriptions.

My references to the discussion of the necessity of a Bill of Rights in the proposed constitution, when it was first sent out for ratification can be confirmed from the minutes of the main Convention and of the State Conventions that discussed this question of ratification.

My statement that Madison and others made the "Gentleman's Agreement" that if they would ratify the Constitution as it then stood, a Bill of Rights would be added, I did not invent but found in these records of debates not only in the Federal Convention—but in the local conventions convened or reconvened for purposes of ratification.

I believe it to be a historical fact that the Constitution, as unanimously sent out was not unanimously ratified.

Mr. Warren does not criticize my reference to the form of the ratification by the New York Convention. But he says that my statement that the Massachusetts Convention ratified conditionally is a historical error. In a sense, Mr. Warren is right, but in the sense shown by the context of my monograph, I was right. I state that a Bill of Rights was framed by the New York convention, recommended to accompany its certificate of ratification and that New York sent along a resolution urging that a second convention be worthwith convened to consider and adopt that Bill of Rights.

Then I go on stating: "Massachusetts made a similar request, but by way of a condition, two of the states did not ratify at all (p. 39)."

My erudite friend, Mr. Frank W. Grinnell of Boston, whose thoroughness is known to all the members of the A. B. A., has kindly excerpted from original publication the facts and I submit that the form of the ratification, while apparently explicit and unconditioned at the start is shown to be limited similarly to that of the New York convention.

Referring to the record of the debates and Proceedings in the convention of the Commonwealth of Massachusetts held in the year 1788, a resolution adopted on the call for the "ayes" and "nays" was that the Commonwealth "assent to and ratify the said Constitution for the United States of America." But these words in the certificate of ratification are *immediately followed* by the following words:

"And as it is the opinion of this Convention, that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this Commonwealth, and more effectually guard against an undue administration of the federal government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution.

"*First*, That it be explicitly declared, that all powers not expressly delegated by the aforesaid Constitution, are reserved to the several States, to be by them exercised. . . etc." (p. 83).

"And the Convention do, in the name and in behalf of the people of this Commonwealth, enjoin it upon their representatives in Congress, at all times, until the alterations and provisions aforesaid have been considered, agreeably to the fifth article of the said Constitution; to exert all their influence, and use all reasonable and legal methods to obtain a ratification of the said alterations and provisions, in such manner as is provided in the said Article."

When these various ratifications by some of the states got back to the United States "in Congress assembled," the members of that Congress were well aware, as I ascertained from the perusal of the pamphlets of current addresses and pamphlet debates that went on in the interim and from the scrutiny of the debates in New York and Virginia and Massachusetts and Pennsylvania—and in spite of the fact that Hamilton, in the Federalist, had argued against the danger of incorporating such a Bill of Rights in the Constitution, directly Congress was organized Madison undertook the preparation of the Bill of Rights promised by the framers of the new Constitution. I make this statement in quotation remarks and cite my historical authority and it is singular that Madison copied the language of the rider to the Massachusetts ratification, when he used the words in urging the consideration of such Bill of Rights, that it was important to remove "by a wise exercise of the power of amendment the honest doubts and apprehensions existing with regard to the security of the rights of the people under the new system."

He then elaborates the kind of rights—individual and personal which the people wanted to have protected and reserved and he said "it will be desirable to extinguish from the bosom of any member of the community any apprehension that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and freely bled" and Rives in his "Life and Times of James Madison" (II, 38-46), referred to these rights by the words "in general, every right and power of the people not delegated or surrendered" which, he said, were thus to be placed "under the aegis of the Constitution *and by an express interdiction beyond the reach of the governments.*'

I respectfully submit, therefore, in rejoinder to the rather contemptuous manner in which Mr. Warren brushes aside the validity of this whole argument, that the rights which the people wanted placed "beyond the reach of the governments" were the rights for which they had fought against King George and their personal liberties were those then common to every Englishman and regardless of the police power of the governments, it is obvious that the only rights that the first Constitutional Convention intended to confer upon the New Federal Government were the governmental and structural rights and powers that would enable it to function as a government apart from and yet surrounding all the states themselves.

The interjection of the Bill of Rights into the Constitutional document with the differentiation as to the form of amendment between the legislatures and conventions of the people confirm my contention that it was intended from the beginning, that a Bill of Rights should go in and that the reservation of the rights of the people in the original document in general terms was not deemed a sufficient particularization of those rights which were to be placed "beyond the reach of the governments" and that while the various legislatures representing the states could abdicate state jurisdictions and state powers by surrendering them in whole or in part to the Federal Government in

ratifying amendments by the Federal Congress—no state legislature, unless especially thereto authorized by that part "of the people of the United States" who constituted its constituency could part with or impair those liberties and rights which, by the Bill of Rights in the Federal Constitution as the supreme law of the land were placed "beyond the reach of the governments."

It must be conceded that the drawing of inferences from a record of what took place at some antecedent time in history may result in conclusions widely apart, according to the preconceptions of those separate individuals who draw the inferences.

But, I think it remains arguable that if the Bill of Rights was prepared as the result of the "Gentleman's Agreement," that it, by its very nature, was unamendable; (2) that if it is amendable, dealing as it does with rights of the people intended to be placed "beyond the reach of the Governments," it comes within the category differentiated by the contemplation of the form of ratification which *is otherwise meaningless;* (3) that if this be true, then the XVIIIth Amendment (which is the first which by its operation takes away any individual rights which might conceivably be among the rights intended to be placed "beyond the reach of the governments) was a proposition that must be submitted to the decision of the people of the United States and that anyhow, that particular objection to the form of its ratification and the validity thereof has not been actually presented to an authoritative court.

New York, March 9.

HENRY W. JESSUP.

Justice Charles N. Potter

Charles N. Potter, Justice of the Wyoming Supreme Court for thirty-three years and former Chief Justice, died at Cheyenne on Dec. 20, 1927. Going to Wyoming 51 years ago, Judge Potter immediately took an active part in political and public affairs. He was one of the signers of the constitution of the state of Wyoming and is declared in many ways to have left the impress of his individuality and ability in marked manner upon the records of the state.

Among the positions of trust and responsibility which he has held are included those of city attorney of Cheyenne, county and prosecuting attorney of Laramie county, attorney general of the state of Wyoming, secretary of the Wyoming Republican State Central committee, and chairman of the Wyoming delegation to the Republican national convention in Minneapolis in 1892. During his service in the supreme court he was for 12 of the 33 years chief justice.

Justice Potter was born in Cooperstown, N. Y., October 31, 1852, the son of W. and Mary J. Potter. After acquiring a public school education at Grand Rapids, Mich., he took up the study of law and won his LL.B. degree with the class of 1873. He then entered upon the practice of law in Grand Rapids, where he remained until March, 1876, when he moved to Cheyenne.

He was a thirty-third degree Mason, being a member of Acacia lodge No. 11, A. F. and A. M., and past grand master of the grand lodge of Wyoming. He likewise was past grand chancellor of the Wyoming grand lodge of the Knights of Pythias, a member of the Cheyenne Lodge No. 660 of the B. P. O. E. and the Woodmen of the World.

Henry Deutsch

Henry Deutsch, a well known member of the Minneapolis bar, passed away suddenly at his home, 2420 Bryant Avenue, South, on January 9, 1928. Masonic services were held by his Thirty-third degree associates at the Scottish Rite Cathedral, and Christian Science services at Lakeside Chapel.

Mr. Deutsch was but 53 years of age and had been a member of the Minneapolis bar for 32 years. At the time of his death, he was senior partner of the law firm of Deutsch, Loeffler & Amick. During his years of activity, Mr. Deutsch has served as chairman of several important committees of the American Bar Association, was actively connected with the Hennepin County Bar Association, and the Minnesota State Bar Association. In 1923 he was appointed chairman of the American Bar Association committee on bankruptcy and for some time waged a warfare on bankruptcy fraud practices, condemning flagrant frauds in commercial law. His committee submitted a special report on bankruptcy, which summarized abuses and proposed legal reforms. Mr. Deutsch was three times elected Vice-President, and in 1910 was elected President of the Commercial Law League of America, an organization of the leading commercial lawyers of the United States and Canada. He has done much constructive work in the bar associations with which he was connected, and has written many splendid articles on bankruptcy practice, equity receiverships, etc., besides doing much to bring about the enactment of crime laws in his own State.

Mr. Deutsch had lived in Minneapolis all his life, having been a descendant of a pioneer Minneapolis family. He received his early education in the public schools and at the Central High School of that city. From the University of Minnesota he received a degree of Bachelor of Laws in 1894, and a year later he completed a post graduate course at Yale University, which made him a master of laws with the distinction of *magna cum laude*. He was admitted to the Minnesota bar in October, 1895.

Henry J. Hersey

Former District Judge Henry J. Hersey died in Denver on January 26, 1928. He suffered a stroke of paralysis on January 15th. Judge Hersey was born in Sandwich, Massachusetts, February 18, 1863. Upon his graduation from Boston University in 1886, he came to Colorado with his bride (nee Annie Louise Budlong). He was a corporation lawyer until his election to the district bench in 1918. Upon his retirement in 1924, he resumed his corporation practice.

Judge Hersey was active in legal, political and patriotic lines; was a member of the Committee on American Citizenship of the American Bar Association, and took a very active interest in work for the Constitution, and among the foreign born. His widow, a daughter, Mrs. Burnet C. Tuthill of Cincinnati, and a son, Henry J. Hersey, Jr., of Salt Lake City, survive him.

M. F. L.

Justice John W. Sheafor

Judge Sheafor of the Supreme Court of Colorado died on January 24, A. D. 1928, at his residence in Denver, after a brief illness. Justice Sheafor was born in Manchester, Ohio, March 9, 1852; was admitted to the Kansas bar when he was twenty-one. He came to Colorado Springs in 1896, and after a term as district attorney, was elected to the district bench. He served as District Judge from 1906 until his election to the Supreme Court in 1922, running ahead of the ticket. He was a Republican and a Presbyterian. At the Judge's request the funeral services were simple and unostentatious, and were held in the First Presbyterian Church of Colorado Springs. He is survived by his widow (nee Katherine Ost); a daughter, Miss Harriet J. Sheafor, and a son, Clarence W. Sheafor. He was a member of the Denver, Colorado, and American Bar Associations.

M. F. L.

George W. Allen

Colorado's "Grand Old Man," George W. Allen, who served as Judge of the District Court of Denver for eighteen years and for ten years as Justice of the Supreme Court of Colorado, retiring as Chief Justice in January, 1927, died on January 28, A. D. 1928. On January 19th, in stepping back to the sidewalk to avoid a speeding automobile, he fell, striking the curbstone. A fractured hip and his advanced age brought the fatal result. Chief Justice Allen will be remembered as delivering the address of welcome at the Denver meeting.

He was born, married and admitted to the bar in Pennsylvania, and was a member of the Pennsylvania legislature on reaching his majority. He migrated to Colorado Territory with his bride in 1875. He was descended from Thomas and Mary Allen, early English settlers in Jamestown, Virginia. Thomas Allen was an anti-slavery man, and after troublous years left Jamestown for Pennsylvania, where his descendants tarried and thrived.

Justice Allen's wife died in 1916. Of his six children, only two survive, Orren Allen of Denver and George W. Allen, Jr., of Seattle. Another son, Judge Harrison Allen of the State of Washington, died about three years ago.

The body lay in state in the rotunda of the Capitol on the morning of January 31st. In the afternoon funeral services were conducted by Sangre de Cristo Chapter of Rose Croix No. 2 A. and A. S. R. in the Scottish Rite Temple before a crowd from all ranks and walks of life.

Justice Allen had a natural legal mind, great dignity, warm kindliness and wide sympathy. Colorado will remember him as a great judge; a host of men in Colorado will carry him in their hearts for turning them from wild and reckless boyhood to useful and honorable manhood. A Prince in Israel has fallen!

MARY F. LATHROP.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Arizona

Arizona Bar Appropriates Funds for National Oratorical Contest

The Arizona State Bar Association gave its unqualified endorsement to the National Oratorical Contest for high-school students, sponsored in the Pacific-Southwest by the Times, according to a press dispatch from Phoenix, dated Feb. 25. The Association pledged the support of its membership in carrying on the contest in the State and voted $1,000 from the Association's funds to help defray the contest expenses in Arizona. The endorsement of the State Bar Association followed similar action taken a few weeks ago by the Nevada State Bar Association and more recently by the Bar Association of Maricopa at its meeting in Phoenix.

Unusual honor was given James P. Lavin of Phoenix in his re-election as president of the association, he being the first executive to succeed himself in the history of the body.

A movement toward incorporation of the Arizona Bar Association on the lines adopted in California was referred to a committee.

Thomas Ridgway, past president California Bar Association and a governor of the present California State Bar, was one of the principal speakers at the meeting. At an evening banquet the guest of honor was Silas H. Strawn of Chicago, president of the American Bar Association, with addresses also made by Superior Judge Jenckes of Phoenix and P. W. O'Sullivan of Prescott.

Illinois

A Statement Adopted by the Board of Managers of The Chicago Bar Association with Reference to an Article Entitled "Hang the Dog," Written by Edwin Hedrick, and Published in the Atlantic Monthly for September, 1927

There appeared in the September number of the Atlantic Monthly an article entitled "Hang the Dog," which was written by Edwin Hedrick, a member of the Chicago Bar. This article aroused instant and general resentment on the part of members of the legal profession throughout the country and was peculiarly brought home to the Chicago Bar by the reference by the editor of the Atlantic Monthly to Mr. Hedrick as a noted trial lawyer of this city.

The article was called to the attention of the Board of Managers of The Chicago Bar Association, which referred the matter to its Committee on Professional Ethics. That Committee, after a full investigation, reached the conclusion, in which the Board of Managers concurred, that Mr. Hedrick had laid himself open to criticism upon two grounds: First, by the article itself he showed that he was guilty of unethical and unprofessional conduct in the trial of several of the cases to which he had referred. Second, by the general tone of his article and several times in express words he had indicated that the conduct to which he resorted was the proper procedure to follow and not at all opposed to due professional methods.

Mr. Hedrick appeared before the Committee and later prepared and submitted for the Board's consideration a letter addressed to the Editor of the Atlantic Monthly with the request that it be published. Upon due consideration the Board of Managers concluded to accept Mr. Hedrick's own characterization of his conduct in lieu of other censure, and to cause his letter to be published in the Atlantic Monthly, the American Bar Association Journal, the Illinois State

Bar Association Quarterly, and The Chicago Bar Association Record.

Copy

"310 South Michigan Avenue,
December 13, 1927.

"Mr. Ellery Sedgwick, Editor,
The Atlantic Monthly,
8 Arlington Street,
Boston (17), Massachusetts.

"Dear Sir:

"I beg to advise you that I have been severely criticised by fellow members of the bar because of the article, "Hang the Dog," written by me and published in the September Atlantic.

"The criticism is that in the narration of incidents in trials in which I had participated and in the discussion contained in the article I have subjected myself to the charge of lacking proper professional ethical standards and that in so far as the articles might be taken as indicative of similar views and practices on the part of the legal profession generally it constitutes an unjust reflection on the bar.

"I now realize that I fully deserve this criticism. I owe it to myself and to the profession to submit the following explanation and to request its publication in the Atlantic.

"The article was written with the intention of expressing my views on the subject of capital punishment and in my enthusiasm to make it more readable and interesting I injected several anecdotal reminiscences. In narrating these reminiscences I freely mingled fiction with the facts. In order to make a good story I referred to incidents in trials of cases in which I had participated, some of which were purely imaginary, and others of which were magnified out of all proportion to their importance and effect in the cases in which they had occurred and were colored and embellished. Thus my story did not conform with the facts.

"This method of treating these incidents has resulted in conveying an erroneous impression of my conduct in trying cases and my conception of the ethics of the profession and of proper trial practice and if regarded as typical of the methods of lawyers generally is a wholly unwarranted reflection on the legal profession.

"This result I did not anticipate and certainly did not intend. I sincerely regret having written an article which has given such an erroneous impression of myself and which has been interpreted as a reproach to the bar.

Yours truly,
(Signed) Edwin Hedrick."

Ohio

State Bar Association Works on New Criminal Code for Ohio

Following its notable work in connection with the new Corporation Act, the State Bar Association will now push forward the preparation and enactment of a new Criminal Code, according to the Ohio Bulletin and Law Reporter of Feb. 13. As published last week the committee of the association having the matter in charge is Judge Thomas H. Darby of Cincinnati, Judge Chauncey M. Newcomer of Bryan, Judge Carl V. Weygandt of Cleveland, Judge Henry M. Scarlett of Columbus and Judge J. M. Lyons of Youngstown. The changes and amendments so far tentatively agreed upon are here outlined.

In the preliminary court it is proposed to take from the court the right to hold one accused of felony to the common pleas court or grand jury as it is called, except after preliminary hearing. This will abolish the so-called "waiving examination."

It is also proposed to give the preliminary court greater discretion in changing the grade of offense from misdemeanor to felony and vice versa in order that the cases may be speedily disposed of in the proper court.

To confer on the prosecuting attorney of the county the duty of taking charge of prosecutions in felony cases in preliminary courts. Thus they would be in his hands throughout the entire prosecution. When a felony has been committed, the prosecuting attorney may, either before or after arrest, procure subpoenas to be issued before any court or magistrate, and require witnesses to testify under oath concerning the offense.

To give to the court of common pleas the right to prosecute in misdemeanor cases by information, without indictment.

To follow the provisions of the Codes of Michigan and other states, by simplifying the form of indictment with provisions for amendment of the indictment under the direction of the court, and for filing bill of particulars in case of insufficient allegations.

To simplify proceedings in insanity cases so that in case of claimed present insanity, to prevent trial or other proceedings, the judge shall determine the matter, with or without a jury, at his discretion. When insanity is set up as a defense it is proposed to determine the insanity matter in a separate proceeding from the trial on the merits of the case, and in case the accused is found to be not guilty by reason of insanity, the verdict shall operate as a commitment to the Lima asylum.

To give the court authority in case of a recognizance for appearance of an accused in the common pleas court, to order a copy of the recognizance within the discretion of the court. Peremptory challenges in all criminal cases, including capital, to be equalized as between the state and the defendant.

To introduce provisions, similar to those in the New York Code, providing for special jurors who may be summoned in case of the trial of intricate or difficult suits, or those involving technical facts.

To provide an habitual criminal act, carrying greater penalty or life imprisonment in cases of habitual criminals.

Proceedings in error to be by certification of the trial judge, upon notice after the bill of exceptions is settled. The time for filing briefs and preparing argument on error proceedings to be shortened, and prosecution of error from the Court of Appeals to the Supreme Court to be likewise by certification, immediately after judgment in case of such notice.

To permit one accused of felony to waive trial by jury, though there may be some question as to whether it may be done without amendment of the constitution.

Bar Meeting Dates

Dates for Bar Association Meetings

The Michigan State Bar Association will hold its annual meeting this year at Bay City, Mich., on Sept. 6 and 7.

The Louisiana State Bar Association will hold its annual meeting at Shreveport on Friday and Saturday, April 13 and 14. Important matters to be considered by the meeting will be, Remedial Legislation respecting Appellate courts in Louisiana and Criminal Procedure in Louisiana. The Association plans to present bills to the Legislature, which meets in May.

The Texas State Bar Association will hold its 1928 convention in Dallas at the Baker Hotel, July 5, 6 and 7. Hon. Louis Brandeis, Associate Justice of the United States Supreme Court, and other notables of the legal profession, will be invited to attend and deliver addresses.

The Montana Bar Association will hold its annual meeting in Yellowstone Park on August 3 and 4.

The Mississippi State Bar Association will hold its annual meeting at Gulfport on May 2 and 3.

The Illinois State Bar Association will meet in East St. Louis on May 31, June 1 and 2.

Miscellaneous

Miscellaneous

Members of the Western Montana Bar Association elected Albert Besancon, of Missoula, president at the annual meeting held in January. Other officers elected were as follows: Fred Schilling, secretary; Ralph Arnold, treasurer; E. F. Gummer, Missoula County; E. M. Tucker, Ravalli County; Wade E. R. Parks, Sanders County; Eugene Harp le, Mineral County, and R. H. Copeland, Lake County, vice-presidents.

Frank Andrews was unanimously elected president of the Houston (Tex.) Bar Association at a recent meeting. Walter Woodul was re-elected secretary and H. F. Montgomery was re-elected treasurer.

At the annual meeting of the Ninth District (Minn.) Bar Association, held in New Ulm, in February, Alfred W. Mueller was elected president. Other officers elected were: W. H. Dempsey, vice-president; William R. Mitchell, secretary-treasurer.

The Springfield (Mo.) Bar Association, at its annual banquet on February 11, elected the following officers: Frank C. Mann, president; A. M. Curtis, first vice-president; Charles W. Dickey, second vice-president; Ernest Hamlin, secretary, and Judge John H. Fairman, treasurer; F. M. McDavid, John T. Sturgis and J. P. McCammon, members of the executive committee.

At the annual meeting of the Tazewell County (Ill.) Bar Association, held February 14, the following officers were chosen: George Brecher, president; R. L. Russell, first vice-president; John T. Culbertson, second vice-president; Raymond Imig, third vice-president; R. H. Allison, secretary, and Harold Rust, treasurer.

Robert L. Holliday was elected president of the El Paso (Tex.) Bar Association for the next year, at the annual meeting in February. Other officers elected were as follows: Gowan Jones (re-elected), secretary, and Ben Howell, treasurer. Judge E. B. McClintock, C. H. Kirkland, Paul D. Thomas, W. H. Burges, Maury Kemp and E. M. Whitaker, compose the new board of directors.

The Nebraska Bar Association of the Ninth Judicial District, at their annual banquet on February 21, elected the following officers: Lyle E. Jackson, president; P. M. Moody, vice-president; Carl Peterson, secretary, and A. E. Wenke, treasurer.

The Benton County (Ia.) Bar Association, recently formed, elected the following officers: G. W. Burnham, Vinton, president; Edward F. Snyder, Belle Plaine, vice-president; Hugh Mossman, Vinton, secretary-treasurer, and G. W. Burnham, Edward F. Snyder, L. J. Kirkland, Charles E. Hughes and J. D. Nichols, members of the executive committee.

At a meeting of the Lauderdale County (Miss.) Bar Association, held in February, Judge C. C. Miller was chosen president. Other officers elected were: Judge Hardy R. Stone, vice-president, and Walker Broach, Jr., secretary-treasurer.

E. Ernest Smith, was elected President of the Richmond County (New York) Bar Association, at its annual meeting in February. Other officers elected were as follows: Elias Bernstein, first vice-president; John M. Braisted, second vice-president; Ernest M. Garbe, treasurer, and George E. Draper, secretary.

The Minnehaha County (So. Dak.) Bar Association, at its annual meeting held February 15, elected the following officers: B. C. Mathews, president; John T. Medin, first vice-president; John H. Voorhees, second vice-president; Tore Teigen, secretary, and John S. Murphy, treasurer.

A. P. Moran was re-elected president of the Otoe County (Neb.) Bar Association, at a recent meeting of the Association. George H. Heinke was re-elected vice-president, and Thomas E. Dunbar, re-elected secretary-treasurer.

The Fourth Judicial District (Ill.) Bar Association, organized in January, elected the following officers: Harry Hershey, Taylorville, president; Judge J. G. Burnsides, Vandalia, vice-president, and District Attorney Carl Price, secretary-treasurer.

At the forty-sixth annual meeting of the Minneapolis (Minn.) Bar Association, Charles E. Purdy was retained as president. Other officers re-elected were as follows: Norton M. Cross, vice-president; S. D. Klapp, secretary and treasurer; George B. Leonard, J. Van Valkenburg, H. D. Irvin, William Frust and Edward Nelson, members of the executive committee.

The Faribault (Minn.) Bar Association, at a regular meeting on February 7, elected the following officers: James P. McMahon, president; A. B. Childress, vice-president, and John E. Coughlin, secretary-treasurer. Lucius A. Smith and Judge C. M. Stockton were chosen trustees.